SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

RUTH CHASE DONALDSON (FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED), SUBSTITUTED AS RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

GEORGE B. LEONARD,
HYMAN EDELMAN,
S. P. GISLASON,
Counsel for Appellees.

LEONARD, STREET AND DEINARD,
Of Counsel.

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RUTH CHASE DONALDSON (FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED), SUBSTITUTED AS RESPONDENTS,

Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Statement of Case.

This is an action in tort, to recover as damages the purchase price of unregistered securities sold on August 10, 1929, in Minnesota by appellant to plaintiff,[1] in violation of the Minnesota Securities Law (Mason's Minn. Stats. 1927, Sec. 3996-1, et seq.), which required their registration. The securities sold consisted of eight shares of the capital stock

[1] By 'plaintiff' herein we refer to Ruth Chase Donaldson, the original plaintiff, who died while the appeal to the Supreme Court of Minnesota was pending.

of Chase National Bank of New York, in combination with eight shares of the capital stock of appellant, Chase Securities Corporation, its securities affiliate. These shares of stock were inextricably linked together, were evidenced by a single indivisible receipt issued by Bankers Trust Company acting as a depository, and were sold only as indivisible units for a lump sum indivisible price. The shares in the Bank could not be transferred without a simultaneous transfer of the shares in the securities affiliate, and vice versa. For brevity, the combined shares will hereinafter be referred to as "Chase units."

Grounds of Plaintiff's Cause of Action.

Plaintiff alleged only one cause of action based on a single sale, and sought to recover on four separate and independent grounds of recovery:

1. The illegal sale by appellant to plaintiff of unregistered stock by its unlicensed salesman, in violation of the Minnesota Securities Act, rendered the sale void, and appellant became liable in tort for the purchase price.

Drees v. *Minn. Petroleum Co.*, 189 Minn. 608, 250 N. W. 563.

Illegality of the sale arose out of the fact that appellant was an investment and not a banking corporation. Its stock, therefore was subject to registration under the Securities Act, notwithstanding that bank stock was exempt.

Commissioner of Securities v. *Chase Securities Corporation*, 298 Mass. 285, 10 N. E. (2d) 472; Appeal to U. S. Supreme Court, dismissed, 302 U. S. 661, 82 L. Ed. 510.

Limitations as to recovery on this ground, prior to July 1, 1941 (effective date of Minn. Stats. 1941, Sec. 80.26; Laws

of Minnesota for 1941, Ch. 547, Sec. 18) were governed by the general six-year Statute of Limitations (Mason's Minn. 1927 Stats., Sec. 9191). The Securities Act itself had no special limitation provision.

Burzinski v. *Kinyon Investment Co.*, 192 Minn. 335, 256 N. W. 233.

As to this ground of recovery, plaintiff having shown that appellant withdrew from Minnesota in 1931, contended that the period of its absence was to be excluded in computing the limitation period under Mason's Minn. 1927, Stats., Sec. 9200 (tolling statute).

2. Appellant's sale and delivery of securities to plaintiff constituted an implied representation that it had complied with the Securities Act by registering said securities and licensing its agents, and that its stock was legally sold to plaintiff. Present scienter, appellant was liable in fraud for the falsity of those representations.

Mary Pickford v. *Bayly Bros.*, 12 Cal. (2d) 501, 86 Pac. (2d) 102;

Le Sage v. *Title Guaranty and Trust Co.*, 12 Cal. (2d) 531, 86 Pac. (2d) 115;

Bartlett v. *Suburban Estates*, 12 Cal. (2d) 527, 86 Pac. (2d) 117;

Miller v. *Osterlund*, 154 Minn. 495, 191 N. W. 919;

Meyer v. *Richards*, 163 U. S. 385, 41 L. Ed. 119, 16 S. Ct. 1148;

Shippen v. *Bowen*, 122 U. S. 575, 30 L. Ed. 1172.

As to recovery on this ground limitations ran from date of discovery of the fraud. Mason's, Minn. 1927 Stats., Sec. 9194-6, provides that such an action for fraud is not "deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.".

3. Appellant's sale of the securities to plaintiff "at market" implied a sale at a price unaffected by its own manipulation of the market.

Otis & Co. v. *S. E. C.* (C. C. A. 6), 106 Fed. (2d) 579, at 583.

Limitations as to recovery on this ground also ran from date of discovery of appellant's fraud.

4. Appellant's wilful concealment of (a) non-registration of its stock, (b) non-licensing of its salesmen, and (c) its pool operations and market manipulations, constituted actionable deceit.

Strong v. *Repide*, 213 U. S. 419, 53 L. Ed. 853, 23 S. Ct. 521;

Stewart v. *Wyoming Cattle Ranch Co.*, 128 U. S. 383, 32 L. Ed. 439, 9 S. Ct. 101.

Limitations as to recovery on this ground also ran from date of discovery of appellant's fraud.

The complaint, in alleging a single cause of action, based on several grounds, conformed to the well settled rule of practice and procedure enunciated in

Tuder v. *Oregon Short Line Ry. Co.*, 131 Minn. 317, 319, 155 N. W. 200,

as follows:

> "He (plaintiff) has only one cause of action, and must present, in this suit, all the grounds upon which he relies for a recovery. He cannot present a part of such grounds in this suit, and, if he fails to establish them, present other grounds in a new suit."

History of Proceedings.

The case was tried before Honorable W. W. Bardwell, of Hennepin County District Court, between May 9, 1939,

and June 10, 1939. The record on appeal consisted of two volumes totaling 1223 pages. There were 117 exhibits.

While the *Donaldson* case was pending in the state court, another test case was decided against appellant by the U. S. District Court for Minnesota, in November 1938, on all of the foregoing grounds of recovery.

Vogel v. *Chase Securities Corporation* (not reported).

A companion case in the same court, was decided against appellant on November 4, 1938, on similar grounds.

Stern v. *National City Company* (D. C., Minn.) 25 Fed. Supp. 948.

On March 18, 1940, the Circuit Court of Appeals for the 8th Circuit decided the *Stern* and *Vogel* cases, and held that limitations were tolled.

City of New York v. *Stern* (C. C. A. 8), 110 Fed. (2d) 601;

Chase Securities Corporation v. *Vogel* (C. C. A. 8), 110 Fed. (2d) 607.[2]

The Circuit Court of Appeals limited its decision in these cases to the first of the above grounds of recovery, and held that the Statute of Limitations was tolled under Mason's, Minn. 1927 Stats., Sec. 9200, after withdrawal by a foreign corporation from Minnesota, although it had in force during its absence a consent to service of process through a state official. It did not find it necessary to decide any of the other issues.

Thereafter, on April 18, 1940, Honorable W. W. Bardwell made and filed Findings of Fact, Conclusions of Law, and Order for Judgment, sustaining recovery in favor of plaintiff on the single ground of appellant's violation of the

[2] Opinions of the Circuit Court of Appeals in the Stern and Vogel cases are hereto attached as Appendix "A".

Securities Act and the tolling of the Statute of Limitations, expressly stating that

> "The court finds it unnecessary to make findings on the claims of actual fraud, implied fraud, and fraud by suppression of material facts, presented by the complaint, inasmuch as the court has allowed recovery on a ground independent of said claims."
>
> (Findings of Fact, April 18, 1940, par. XXVI)

Appellant appealed to the Supreme Court of Minnesota from an order dated May 6, 1940, denying its motion for amended findings, or, in the alternative, for a new trial, and also from a judgment entered in favor of plaintiff on June 18, 1940. The only issue involved in said appeal was the construction of the tolling statute (Mason's Minn. Stats. 1927, Sec. 9200).

On January 10, 1941, the Supreme Court of Minnesota, by a 4 to 3 majority, held contrary to the Circuit Court of Appeals for the 8th Circuit in the *Stern* and *Vogel* cases, *supra*, and reversed said order and judgment. It said:

> "Our decision in a companion case, Pomeroy v. National City Co. 209 Minn. 155, 296 N. W. 513, is decisive of the only question presented by this appeal and requires reversal of the judgment under review.
>
> This record indicates the presence of issues other than that of the tolling of the statute of limitations. If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result."
>
> *Donaldson v. Chase Securities Corporation*, 209 Minn. 165, at page 166, 296 N. W. 518.

Thereafter, on April 9, 1941, plaintiff moved the trial court for an order supplementing and correcting the Findings of Fact made on April 18, 1940, so as to secure determination of the issues of fraud by implied representation,

fraud by manipulation of the market, and fraud by concealment.

On April 27, 1941, the Minnesota Legislature enacted a comprehensive revision of the Securities Law (Laws of Minnesota, 1941, Ch. 547, hereinafter referred to as: "1941 Laws"), including for the first time in section 18 thereof, a special limitations section, as follows:

> "No action shall be maintained for relief upon a sale of securities made in violation of any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or non-registration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective . . . ."

On May 16, 1941, plaintiff moved for supplemental findings of fact and conclusions of law, with respect to applicability of the 1941 Law.

On May 14, 1941, appellant filed its motion to amend the Findings of Fact dated April 18, 1940.

Thereafter, and on June 27, 1942, Honorable W. W. Bardwell made and filed Findings of Fact, Conclusions of Law, and Order for Judgment in favor of plaintiff on all of her asserted grounds of recovery.[3]

---

[3] Findings of Fact, Conclusions of Law and Order for Judgment, dated June 27, 1942, are attached hereto as Appendix "B".

With respect to the first ground of recovery, the trial court held that plaintiff was entitled to recover in tort on the ground of illegal sale by appellant, and that the bar of limitations with respect thereto was lifted by the 1941 Law (Appendix "B", par. XXXII).

With respect to the second ground of recovery, the trial court held that the sale and delivery of the securities by appellant to plaintiff constituted an implied representation that it had complied with the Securities Act by registering its securities and licensing its agents, and that its stock was legally sold to plaintiff (Appendix "B", pars. XV, XIX, XX and XXI).

With respect to scienter, the court found that appellant knew and was familiar with the requirements of the Securities law and wilfully failed to register its Chase units for sale in Minnesota. It further found that for a considerable time prior to August 8, 1929, appellant was engaged, in association with Dominick and Dominick, and others, in pool operations by means of which the market price of Chase units was manipulated and controlled, and whereby appellant and its associates were enabled to unload their holdings of Chase units upon the public at great profits to themselves, and whereby the public was attracted to the market by false and deceptive appearance of demand and supply, and was induced to purchase said units at prices which were not arrived at by lawful and legitimate factors of supply and demand in the securities market (Appendix "B", pars. XIX, XXIII to XXXI, inclusive). The trial court further found that appellant must have known that if it had attempted to register the Chase units in Minnesota it would have been compelled to reveal the facts with respect to its pooling operations which constituted information relative to securities necessary for the Commission to enable it to determine whether said securities should be registered, and properly to pass upon an application for

registration, and that with such knowledge appellant attempted to evade the law requiring the Chase units to be registered (Appendix "B", par. XIX).

With respect to limitations, the trial court found that plaintiff did not discover appellant's fraud until October 1, 1937, shortly prior to the commencement of the action, and that the action was seasonably commenced (Appendix "B", pars. XXXII and XXXIII).

With respect to the third ground of recovery, the trial court held that appellant sold the securities to plaintiff "at market" and that it represented to plaintiff that there was a free, uncontrolled and unmanipulated market for said Chase units, and that the price thereof was determined by lawful and legitimate factors of supply and demand, free from any manipulation or control by appellant, all of which representations were false (Appendix "B", pars. XVI, XIX, XXII to XXXII, inclusive). With respect to this ground of recovery, the court likewise found that the limitations ran from date of discovery (Appendix "B", par. XXXII).

With respect to the fourth ground of recovery, the trial court held that appellant wilfully concealed and suppressed the true facts with respect to nonregistration of its stock, non-licensing of its salesmen, and its pooling operations and market manipulations, and that with respect to such ground of recovery, limitations ran from date of discovery (Appendix "B", pars. XVII, XVIII and XXXII).

On September 8, 1942, appellant filed a motion for amended findings or, in the alternative, for a new trial, which was denied by order dated November 18, 1942. On November 25, 1942, judgment was entered in favor of plaintiff and against appellant in District Court of Hennepin County, Minnesota.

On November 25, 1942, appellant appealed for the second time to the Supreme Court of Minnesota from said

order denying its motion for amended findings or for a new trial, dated November 18, 1942, and from the judgment dated November 25, 1942.

On December 31, 1943, the Supreme Court of Minnesota unanimously affirmed the order and judgment of the trial court (*Donaldson, et al.* v. *Chase Securities Corporation* (Minn.) 13 N. W. (2d) 1), but limited its decision to the first ground of recovery, holding that

1) Appellant's sale of the securities to plaintiff was, unquestionably in violation of law;

2) The action was in tort (and not upon a "liability created by statute"), and plaintiff was entitled to recover the purchase price unless barred by limitations;

3) The Legislature, in enacting the 1941 Law intended for a period of one year from its effective date, to lift the bar as to causes of action which accrued more than five years prior to said effective date;

4) The Legislature did not violate the state or federal constitutions by lifting the bar of limitations as applied to this case;

5) The 1941 Law was applicable to this case which was a pending case at the time said law was enacted.

A companion case, *Pomeroy* v. *National City Company*, was decided in accordance with the *Donaldson* case on the same day (Minn.) 13 N. W. (2d) 6).

Petition for Re-argument was unanimously denied in both cases on February 23, 1944. There has been no appeal to this court by the National City Company in the *Pomeroy* case.

The case now comes before this court on appeal from the final judgment of the Supreme Court of Minnesota. Appellees[4] assert that no federal questions are presented.

[4] During the pendency of the Appeal to the Minnesota Supreme Court, the original plaintiff died, and Appellees, executors of her estate, were substituted as respondents therein.

Argument in Opposition to Jurisdiction.

Appellees aver that this Honorable Court is without jurisdiction for the reason that none of the Assignments of Error presents a federal question.

I.

CLAIM THAT ADHERENCE TO CAMPBELL v. HOLT DENIES APPELLANT DUE PROCESS OF LAW (ASSIGNMENTS OF ERROR 1 AND 3).

At the outset, it is important to point out that, as said in *Graham* v. *Goodcell*, 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186,

> "This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached."

There is no question here as to appellant's liability (*Commissioner of Securities* v. *Chase Securities Corporation*, 298 Mass. 285, 10 N. E. (2d) 472; appeal dismissed 302 U. S. 660, 82 L. Ed. 510, 58 S. Ct. 476.) Further, at the time the 1941 Law was enacted, appellant was subject to liability upon several other asserted and well supported grounds of recovery.

See: *Mary Pickford* v. *Bayly Bros.*, 12 Cal. (2d) 501, 86 Pac. (2d) 102.

a) Claim that Due Process was denied because state court applied *Campbell v. Holt* rather than *Danzer & Co.* v. *Gulf & S. I. R. Co.*

It is first claimed that the Minnesota Supreme Court denied appellant due process because it failed to apply the principle of the *Danzer* case (268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612). It was there held that a legislature cannot lift the bar as to a cause of action which was limited by

the very statute which created it. In this connection appellant urges that

1. Plaintiff's first ground of recovery is "upon a liability created by statute".
2. Plaintiff's first ground of recovery must be regarded as though limited by the statute that created it, even though it is governed by the general statute of limitations.

This contention of lack of due process is completely without merit because

1. This court has repeatedly held that it will accept as binding the construction and interpretation placed upon a state statute by the State Supreme Court.

Roe v. *Kansas*, 278 U. S. 191, 73 L. Ed. 259, 49 S. Ct. 60;

Cargill Co. v. *Minnesota*, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423;

Tullis v. *Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. Ed. 192, 20 S. Ct. 136;

St. Louis I. M. & S. R. Co. v. *Paul*, 173 U. S. 404, 43 L. Ed. 746, at 748, 19 S. Ct. 419;

Missouri Pacific Railway Co. v. *Nebraska*, 164 U. S. 403, at 414, 41 L. Ed. 489, at 494, 17 S. Ct. 130;

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota*, 134 U. S. 418, 456, 33 L. Ed. 970, at 980, 10 S. Ct. 462.

2. In its opinion (13 N. W. (2d) 1, 3), the Minnesota Supreme Court rejected appellant's claim that plaintiff's first ground of recovery was upon "a liability created by statute", and said:

> "'The action is in tort', citing *Drees* v. *Minnesota Petroleum Co.*, 189 Minn. 608, 611, 250 N. W. 563, 565."
>
> *Donaldson* v. *Chase Securities Corporation* (Minn.), 13 N. W. (2d) 1,3.

That construction is binding on this court.

3. Previous decisions of the Minnesota Supreme Court completely refute appellant's contentions. A cause of action for recovery of damages on account of the illegal sale of securities has been held governed by the general statute of limitations which has been in force ever since Minnesota was a state.

Burzinski v. *Kinyon Investment Co.*, 192 Minn. 335, 256 N. W. 233.

The first Securities Act was enacted in 1917, Laws of Minnesota 1917, Chap. 429. No special limitation provision was contained in the Securities Act until the enactment of the 1941 Law.

The former Securities Act did not expressly confer any right of action, but because it was enacted for the benefit of a class, it was held to give rise to a common law right of action in tort against a seller violating its provisions, although the Act did not expressly so provide.

Vercellini v. *U. S. I. Realty Co.*, 158 Minn. 72, 196 N. W. 672;

Webster v. *U. S. I. Realty Co.*, 170 Minn. 360, 212 N. W. 806;

Drees v. *Minnesota Petroleum Co. supra.*

Such action is not "upon a liability created by statute."

Olesen v. *Retzlaff*, 184 Minn. 624, at 632, 238 N. W. 12, 239 N. W. 672;

Osborne v. *McMasters*, 40 Minn. 103, 41 N. W. 543, 12 A. S. R. 698;

Metropolitan R. R. Co. v. *District of Columbia*, 132 U. S. 1, 12, 33 L. Ed. 231, 10 S. Ct. 19.

The general statute of limitations has always been construed by the Minnesota Supreme Court as affecting the remedy only.

In re Daniels, 208 Minn. 420, 294 N. W. 465, where the court said:

> "A general statute of limitations does not condition rights. It simply prescribes the time within which rights may be enforced; hence it relates to the remedy only."

Accord:

Dunnell's Minn. Digest, Secs. 1546, 1617, 5587;
Kocizek v. Brigham, 169 Minn. 57, 210 N. W. 622;
U. S. v. Whited & Wheless, 246 U. S. 552, 62 L. Ed. 879, 38 S. Ct. 367.

The difference between *Campbell* v. *Holt* and the *Danzer* case was recognized by the Minnesota Supreme Court.

Kanellos v. G. N. Ry. Co. 151 Minn. 157, 186 N. W. 389:

> "But we are unable to concur in the contention that the limitation fixed by the liability act should be construed as an ordinary statute of limitations. It has not received that construction in the Federal courts, at least no decision from those courts so deciding has been called to our attention. The case of Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, is not such a case, for there an ordinary limitation statute was involved, and not one like that in the case at bar."

Indeed, in the Danzer case, this court recognized the same distinction when it said concerning *Campbell* v. *Holt*:

> "The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional." The opinion distinguishes the case.

> from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only."

As to the point that the Danzer case should have been applied the Supreme Court said in this case:

> "The case at bar is to be distinguished from a third class of cases where a cause of action is created by statute, such as Lord Campbell's Act, the Interstate Commerce Act, 49 U. S. C. A., Sec. 1 et seq., or the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., and the same statute prescribes a period of limitation within which the cause must be brought. The weight of authority in such cases is that the period of limitation is a part of the cause of action, and if it is not brought within the time specified it may not be revived. Negaubauer v. Great N. Ry. Co., 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150; Kannellos v. Great N. R. Co., 151 Minn. 157, 186 N. W. 389; Danzer & Co., Inc. v. Gulf & S. I. R. Co., 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126."
>
> *Donaldson* v. *Chase Securities Corporation* (Minn.) 13 N. W. (2d) 1, 5.

In contending that the Minnesota Supreme Court should have here applied the principle of the Danzer case, appellant is merely quarrelling with the state court's construction and interpretation of its own statutes. As already appears, the decision of the state court as to the nature of a cause of action for violation of a Securities Act which did not expressly confer a right of action and which contained no limitations provision of its own but was governed by the general statute of limitations was obviously right and consistent with a long line of previous holdings. It comes to this then, the Minnesota Supreme Court has said that the remedy only was affected. Appellant, by this ap-

peal is asking this court to hold that the State Supreme Court erred in interpreting its own statutes.

But, even if the State Supreme Court were wrong, Appellant cannot complain that such error denied it any constitutional rights because this court, in judging of constitutionality, will accept the construction placed by the state court upon its own statutes. Recently, Justices Douglas and Black in

Demorest v. *City Bank Farmers Trust Co.*, 88 L. Ed. 340, at page 347,

expressed this thought as follows:

> "That is a question of New York law on which the New York court has the final say. It is none of our business whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous. Sauer v. New York, 206 U. S. 536, 545-548, 51 L. Ed. 1176, 1181, 1182, 27 S. Ct. 686."

There was no denial of due process in the court's holding that the *Danzer* case had no application:

> b) Appellant next contends that if the *Danzer* case was not applicable, then the Minnesota Supreme Court denied it due process by following rather than rejecting *Campbell* v. *Holt*, a decision of this court which has stood as law for sixty years.

The proposition that a legislature has a perfect right to restore a remedy already barred, because it will not take away any vested right of property, is fully developed by Mr. Justice Miller in *Campbell* v. *Holt*, supra, and his analysis need not be here repeated.

Judge Clark recently in *Pittsburgh Can Co.* v. *U. S.* (C. C. A. 3), 113 Fed. (2d) 821, gave this terse affirmation of the doctrine:

> "The flaw seems to lie in a straining in favor of 'law Latin' and again plain English. This straining pro-

ceeds, as we have indicated, from some notion of hardship. That notion of hardship proceeds in its turn from a sentimental but illogical analysis of the purposes of statutes of limitation. Those statutes confer no vested rights. They are *ex gratia* to the individual to protect him from perjury and they benefit the public by accelerating litigation. There is no unfairness in retrospectively removing something that was only a shield."

The Supreme Court of Minnesota said with respect to this point:

"In Campbell v. Holt, the Supreme Court held that a statute which applied merely to the remedy did not vest such a right in the defendant that the Legislature or, in that case, the Constitution of the state of Texas, could not lift the bar of the limitation and thereby revive the cause. Strictly speaking, it is not a revival of the cause in the technical sense of that term as used in connection with abatement but merely a lifting of the bar against the remedy.

"In Kipp v. Johnson, 31 Minn. 360, 363, 17 N. W. 957, 959, this court, speaking through Mr. Justice Mitchell, said, 'No man has a vested right to a mere remedy, or in an exemption from it.' In that case the distinction subsequently recognized in Campbell v. Holt was stated with approval.' This court said (31 Minn. 362, 17 N. W. 958): 'But what are often indiscriminately called statutes of limitation consist of two distinct classes: *First*, statutes of limitation, properly so called, where the prescription operates as the foundation of title to property in possession. The lapse of time limited by such statutes not only bars the remedy, but *extinguishes the right* and vests a perfect title in the adverse holder. Stocker v. Berry, 1 Ld. Raym. 741; Leffingwell v. Warren, 2 Black (599), 605 (17 L. Ed. 261); Bull. N. P. 103. The *second* class are those which merely take away or suspend certain remedies or forms of action, but leave the property rights of the parties unaffected. This last class is rather an exemption from the servitude of cer-

tain forms of action that — a means of the acquisition of title. In such a case the legislature would have a perfect right to restore the remedy already barred, because it would not take away any vested rights of property.'

"It is true that in Kipp *v.* Johnson the court considered that the plaintiff had another remedy that had not been barred by the statute which had been repealed, but we regard the court's statement of the law as quoted above as announcing the sound and logical rule even if there be no other remedy. In House *v.* Carr, 185 N. Y. 453, 78 N. E. 171, 172, 6 L. R. A., N. S., 510, 113 Am. St. Rep. 936, 7 Ann. Cas. 185, the court said:

> 'It must be borne in mind that the statute of limitations in this state never pays or discharges a debt, but only affects the remedy. It would be within the constitutional power of the Legislature to repeal the Statute of Limitations and revive claims, the enforcement of which have been barred by the statute for a generation.'

"We do not follow the logic of such cases as Eingartner *v.* Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871, and State *v.* Chicago & N. W. Ry. Co., 132 Wis. 345, 112 N. W. 515, or the Illinois cases which regard the running of the statute as paying the debt.

"We have been cited to no case where we have drawn any distinction between our interpretation of the due process clause in our State Constitution and the interpretation given to the due process clause of the Federal Constitution by the Supreme Court of the United States. We do not find that Campbell v. Holt has been reversed or reconsidered and we regard it as sound law; and certainly, so far as the Federal Constitution is concerned, it is binding on this court until reversed by the Supreme Court.

"Statutes of limitation which only bar the recovery of a debt or damage for tort are a matter of legislative public policy or expediency and may be changed as legislative wisdom dictates. The bar of such statutes

may be lifted without violating the due process clauses of either the State or Federal Constitutions. See, also, McEldowney v. Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609; Orman *v.* Van Arsdell, 12 N. M. 344, 78 P. 48, 67 L. R. A. 438."

Donaldson v. *Chase Securities Corp.* (Minn.) 13 N. W. (2d) 1, 4.

It is claimed that a federal question exists because some state courts have rejected *Campbell* v. *Holt*. At least nine (and not three as claimed by appellant) jurisdictions have followed it unqualifiedly.

Conn.—*Gilbert* v. *Selleck* (1919) 93 Conn. 412, 106 At. 439;

Ind.—*Jackson Hill Coal Co.* v. *Commissioners* (1914) 181 Ind. 335, 104 N. E. 497; *Hillyer* v. *Boyd* (1941) 218 Ind. 238, 32 N. E. (2d) 93;

Mich.—*Evans Products Co.* v. *Fry* (1943) 307 Mich. 506, 12 N. W. (2d) 448;

Minn.—*Donaldson* v. *Chase Securities Corporation* (1943) 216 Minn. —, 13 N. W. (2d) 1; *Pomeroy* v. *National City Co.*, 216 Minn. —, 13 N. W. (2d) 6;

Mont.—*Berkin* v. *Healy* (1916) 52 Mont. 398, 158 Pac. 1020;

N. Mex.—*Orman* v. *Van Arsdell* (1904) 12 N. M. 344, 78 Pac. 48;

Pa.—*Bates* v. *Cullum* (1896) 177 Pennsylvania 633, 35 Atl. 861;

Wash.—*Herr* v. *Schwager* (1927), 145 Wash. 101, 258 Pac. 1039;

W. Va.—*McEldowney* v. *Wyatt* (1898) 44 W. V. 711, 30 S. E. 239, 45 L. R. A. 609.

The Federal courts have never departed from it.

Paramino Lumber Co. v. *Marshall*, 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600;

Graham v. *Goodcell*, 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186;

Pittsburgh Can Co. v. *U. S.* (C. C. A. 3) 113 Fed. (2d) 821;

City of Sour Lake v. *Branch* (C. C. A. 5) 6 Fed. (2d) 357;

Huntley v. *Gile*, 32 Fed. (2d) 859;

Wright & Taylor v. *Lucas* (D. C.) 34 Fed. (2d) 328, affirmed C. C. A. 6, 45 Fed. (2d) 75; affirmed 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186;

Oak Worsted Mills v. *U. S.*, 36 Fed. (2d) 529;

Regla Coal Co. v. *Bowers* (D. C.) 37 Fed. (2d) 373, affirmed in *Daniel Reeves, Inc.* v. *Anderson* (C. C. A. 2), 42 Fed. (2d) 679, affirmed 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186;

U. S. v. *E. Hogshire Son & Co. Inc.*, 37 Fed. (2d) 239;

Rockland & Rockport Lime Corp. v. *Ham* (D. C.) 38 Fed. (2d) 239;

North American Creamery Co. v. *Willcutts* (D. C.) 38 Fed. (2d) 483, Appeal dismissed (C. C. A. 8) 49 Fed. (2d) 1082;

Wyman Partride Co. v. *U. S.* (D. C.) 41 Fed. (2d) 886;

American Glue Co. v. *U. S.*, (D. C.) 42 Fed. (2d) 235;

Imhoff-Berg Silk Dyeing Co. v. *U. S.*, 43 Fed. (2d) 836;

United Thacker Coal Co. v. *Commissioner* (C. C. A. 1), 46 Fed. (2d) 231;

Simmons Mfg. Co. v. *Routzahn* (C. C. A. 6) 62 Fed. (2d) 947, Cert. denied 289 U. S. 751, 77 L. Ed. 1496, 53 S. Ct. 695;

Pratt & Litchworth v. *U. S.* (D. C.) 1 Fed. Supp. 745;

Daube v. *U. S.*, 1 Fed. Supp. 772;

McKay v. *Bradley*, 26 App. D. C. 449;

Joy Floral Co. v. *Commissioner*, 7 B. T. A. 800;

F. A. Gillespie v. *Commissioner*, 20 B. T. A. 1068.

Upon examination, it appears that some of the jurisdictions claimed by appellant to have rejected *Campbell* v. *Holt* have not done so or have only indicated dissent by way of dictum.[5]

Some courts sustain retroactive statutes which lift the bar of limitations, in situations calling for special and equitable treatment without giving unqualified approval to *Campbell* v. *Holt*.[6]

But these New York and Massachusetts decisions, even though giving limited approval to *Campbell* v. *Holt* necessarily depend upon the existence of some power in the legislature consistent with the due process clause to lift the bar of limitations.

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[5] Appellant claims that Michigan in *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142, has rejected *Campbell* v. *Holt*. The case does not cite *Campbell* v. *Holt*, and certainly the decision is not based on the power of the legislature to lift the bar of limitations. Indeed, on December 29, 1943, the Supreme Court of Michigan, in *Evans Products Co.* v. *Fry*, 307 Mich. 506, 12 N. W. (2d) 448, strongly relies on *Campbell* v. *Holt*, and quotes liberally therefrom.

Siefkin v. *Siefkin*, 150 Kans. 396, 92 Pac. (2d) 1005, was decided on the ground that the legislature did not intend to lift the bar retroactively, and consequently, any statements contained therein with respect to *Campbell* v. *Holt* are dictum.

Likewise *Hickory Co.* v. *Forester*, 204 N. C. 163, 167 S. E. 691, did not squarely decide the point and is dictum.

Eingartner v. *Illinois Steel Co.*, 103 Wis. 373, 79 N.W. 443, represents the view that limitations bars the right as well as the remedy, a theory which has found little acceptance in the courts.

[6] *Robinson* v. *Robins Dry Dock and Repair Co.*, 238 N. Y. 271; 144 N. E. 579, 36 A. L. R. 1310; Error dismissed 271 U. S. 649, 46 S. Ct. 636, 70 L. Ed. 1131.

Cf. however, *People ex rel. Equitable Holding Corporation* v. *Graves* (1942), 33 N. Y. Supp. (2d) 476, which cited *Campbell* v. *Holt* with approval, and said:

"No right is destroyed when the law restores a remedy which had been lost."

Danforth v. *Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033, 86 A. S. R. 495.

Dunbar v. *Boston & P. R. Corp.*, 181 Mass. 383, 63 N. E. 916.

Mulligan v. *Hilton* (Mass.), 24 N. E. (2d) 676, 133 A. L. R. 376.

Able jurists have in recent cases stated that the majority view in *Campbell* v. *Holt* is based upon sounder reasoning. Thus, in *Herr* v. *Schwager*, *supra*, it was said:

> "It seems to us after reading all the cases which have decided the question that the better reasoning is with the majority view of the Federal Supreme Court. If, as all courts hold, a statute of limitation operates upon the remedy only and does not destroy the obligation, we think that by the running of the statute a debtor does not acquire a vested right not to pay a debt which at no time has been destroyed."

On December 29, 1943, just two days before the Minnesota Supreme Court rendered its opinion in this case, the Supreme Court of Michigan decided *Evans Products Co.* v. *Fry* (1943) 307 Mich. 506, 12 N.W. (2d) 448, which quoted at length from and approved the majority holding in *Campbell* v. *Holt*. The Michigan Supreme Court sustained its recently enacted escheat law which required corporations holding unclaimed credits to turn them over to the State to be administered under its escheat procedure, even though the statute of limitations may have long since run on such credits. It was contended that such corporations actually had vested rights in such barred credits, and that the State could not constitutionally disturb them. However, the statute was sustained.

The whole problem of lifting the bar as to barred remedies is one of legislative wisdom and judgment in dealing with remedies to determine what situations appropriately call for the exercise of the power to lift the bar. It is not a question of due process.

c) 1941 Law viewed as lifting the bar of limitations as to one remedy, when several other unbarred remedies remain.

Analysis of the Complaint, and of the Findings of Fact, dated June 27, 1942, Appendix "B", discloses that plaintiff

asserted four separate grounds of recovery to support her single cause of action. On the first appeal the Supreme Court in this case, 209 Minn. 165, 296 N.W. 518, reversed the order and judgment as to the issue of tolling only, and with respect to other issues, the decision was "without prejudice to them or the result." The 1941 Law, by cataloguing the various grounds of recovery, is a legislative recognition of the prior existence of the several grounds of recovery asserted by plaintiff.

Plaintiff's cause of action was not barred by the first *Donaldson* decision. All that was there held was that the lower court erroneously construed the tolling statute. That decision became the "law of the case" on the issue of tolling, but the action remained pending as to all other issues. The case was sent back for further proceedings.

The barring of one remedy or ground of recovery did not "smother the right to pursue the others."

U. S. v. *Whited & Wheless*, 246 U. S. 552, 62 L. Ed. 879; 38 S. Ct. 367;

Jackson v. *Holbrook*, 36 Minn. 494, 32 N.W. 854, 1 A.S.R. 683;

34 *Am. Jur. Limitations of Actions*, Sec. 403, p. 316.

Even in those jurisdictions which have refused to follow *Campbell* v. *Holt*, it has been held that there is no constitutional objection to lifting the bar as to a barred remedy at a time when other unbarred remedies still exist. As stated by Mr. Justice Mitchell in *Kipp* v. *Johnson*, 31 Minn. 360, the lifting of the bar in this situation "would not be to divest him of any vested rights or property, but simply to increase the remedies or forms of action in which such rights might be tested."

Cf. *Power* v. *Telford*, 60 Miss. 195 (where the court held that the legislature might revive a barred remedy

at a time when an unbarred remedy was still outstanding),
and *Davis* v. *Minor* (Miss.), 1 How. 183, 28 A. Dec. 325.
See also: *Alvord* v. *Little*, 16 Fla. 158;
U. S. v. *Whited & Wheless*, 246 U. S. 552, 62 L. Ed. 879; 38 S. Ct. 367.

d) Viewed as lifting the bar of limitations in a special situation calling for special and equitable treatment.

After the decision on the first appeal, plaintiff still had three grounds of recovery with respect to which limitations ran from date of discovery.

Mason's Minn. 1927 Stats., Sec. 9191-6.

Prior to the enactment of the 1941 Law, the Securities Act (Mason's Minn. 1927 Stats., sec. 3996-24) provided that

> "Nothing in this Act shall limit statutory or common law right of any person to bring action in any court for any act involved in the sale of securities, or the right of the state to punish any person for any violation of any law."

This section was superseded by Section 18 of the 1941 Law. By its terms, Section 18 provides for a six-year limitation period from date of delivery of the securities, regardless of whether the ground of recovery is a violation of a provision of the Securities Act, or a provision of a registration thereunder, or is based upon a "representation with respect to the registration or non-registration of the security claimed to be implied from any such sale," or upon failure to disclose that the sale was made in violation of law or of a provision for registration under such law.

Applied to all claims, whether pending or unasserted, discovered or undiscovered, the result of the 1941 statute without the proviso would have been to deprive plaintiff and

others similarly situated of the right to have the limitations period run from date of discovery. As an obvious adjustment for this deprivation, and, in the light of the background of the litigation, which is of public record in the State and Federal Courts, the Legislature, as to causes of action which accrued more than five years prior to the effective date of the new statute granted a one-year period following such effective date within which such actions might be brought. The phrase "such action" obviously included an action brought for recovery on any of the grounds enumerated in the statute. The Supreme Court held that the legislature had power, in connection with the retrospective application of this new and special statute of limitations, to make provision for final adjustment and repose of pending claims involving, among other compensating features, the lifting of the bar as to a ground of recovery affected by the former general statute of limitations.

The Supreme Court of Minnesota had this in mind when it said in its opinion in this case:

> "Causes of action for such violations were not distinguished from those in deceit which under the prior law may or may not have accrued more than six years prior to the effective date of the act. • • • We hold that the legislature did not violate the constitution by lifting the bar of the statute as applied to this case."

Courts have sustained statutes lifting the bar in special situations calling for special and equitable treatment, without giving unqualified approval to the doctrine of *Campbell v. Holt*.

Thus, in *Robinson v. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 579, 36 A. L. R. 1310, error dismissed 271 U. S. 649, 46 S. C. 636, 70 L. Ed. 1131, the Legislature removed the bar of the statute of limitations applicable to death from wrongful act. Plaintiff had sought relief under

the compensation act applicable in the case of admiralty jurisdiction, at a time when his action seemed well taken under prevailing statutory interpretations. Later the Supreme Court of the United States overruled the statutory interpretations and held them inapplicable. He was then relegated to relief by action under the wrongful death statute; but in the meantime the statutory period had elapsed. The Legislature in this situation enacted a special revivor statute which enabled plaintiff to commence an action after the time limited by general or special laws, "and within one year after this act goes into effect." The court said:

> "The statute was enacted solely for the purpose of enabling a party to bring an action when, without such statute, lapse of time would furnish a complete defense. It results, therefore, in depriving the defendant of a valid defense."

The cases of *Danforth* v. *Groton Water Company*, 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495, and *Dunbar* v. *Boston & P. R. Corp.*, 181 Mass. 383, 63 N. E. 916, both hold without committing themselves to complete adherence to *Campbell* v. *Holt*, that in situations requiring special and equitable treatment the Legislature does have the power to lift the bar as to an outlawed remedy.

In the *Danforth* case, without committing himself to an unqualified approval of *Campbell* v. *Holt*, Chief Justice Holmes said:

> "But however that may be, multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small."

In *Dunbar* v. *Boston & P. R. Corp.*, *supra*, the court said:

> "That the constitutional provisions allow a certain limited degree of latitude in dealing with cases where remedies have been extinguished by lapse of time when the seeming infraction of right is not very great and when justice requires relief. It is unnecessary to go so far as Campbell *v.* Holt."

Mulligan v. *Hilton* (Mass.) 24 N. E. (2d) 676, follows the *Danforth* and *Dunbar* cases and is another instance where the power of the Legislature to lift the bar of limitations was upheld in a special situation.

In view of the availability of plaintiff's common law remedies at the time of the enactment of the 1941 Law, and in view of the general plan of adjustment and repose adopted, the lifting of the bar as to the first ground of recovery was valid. Even those authorities which have refused to follow *Campbell v. Holt*, or have refused to give it unqualified approval, are not opposed to this conclusion.

Campbell v. *Holt* applied to a statute so construed, does not deprive appellant of any rights without due process of law.

Paramino Lumber Co. v. *Marshall*, 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600;

Carpenter v. *Wabash Railway Co.*, 309 U. S. 23, 84 L. Ed. 558, 60 S. Ct. 416;

Graham v. *Goodcell*, 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186;

Rafferty v. *Smith B. & Co.*, 252 U. S. 226, 66 L. Ed. 208, 42 S. Ct. 71;

U. S. v. *Heinszen*, 206 U. S. 370, 51 L. Ed. 1098, 27 S. Ct. 742.

(c) Important considerations of public policy require adherence to *Campbell* v. *Holt*.

1. The contention that this Court should now announce that a general statute of limitations operates not only to bar the remedy but to destroy the right, would have far-reaching effects in many fields of settled law. For many years it has been the unquestioned law that a general statute of limitations operates on the remedy only, and is the basis of the following well accepted doctrines:

(a) A new promise revives the remedy on a barred indebtedness.

(b) A partial payment revives the remedy on a barred indebtedness.

(c) A debt barred in the state where it accrued can still be enforced in a forum where the limitation period is longer.

(d) The bar of one remedy does not prevent the assertion of the cause of action on another remedy.

(e) Although a mortgage indebtedness is barred, a mortgage may still be foreclosed.

2. The doctrine of *Campbell v. Holt* is important in the protection of public revenues against the inequitable assertion of limitations to prevent collection of taxes.

3. The power of the Legislature to remove a statutory bar which has conferred an immunity is necessary in many instances to prevent injustice and maladministration.

4. The question of retrospective change of remedies is basicly one of legislative discretion and not of due process of law. Legislatures are not to be distrusted. "The possible abuse of a power is not an argument against its existence."

Lottery cases (*Champion v. Ames*) 188 U. S. 321, 363, 47 L. Ed. 492, 504, 23 S. Ct. 321;

Arizona v. California, 283 U. S. 423, 75 L. Ed. 1154, 51 S. Ct. 522.

Sixty years of experience under *Campbell* v. *Holt* has failed to demonstrate irresponsible application of this discretionary legislative policy.

II.

Claim That 1941 Law Denies Due Process Because Appellant Had "Vested Right" in Judgment of Reversal on First Appeal (Assignment of Error 2).

By this contention, Appellant urges that even if *Campbell* v. *Holt* is the law and the Legislature does possess the power to lift the bar as to a barred remedy, that could not be done in this case because appellant had acquired "vested rights" by virtue of the reversal on the first appeal. In this connection, appellant also claims that the Legislature reversed the decision of the Minnesota Supreme Court on the first appeal.

The contentions are based upon six misconceptions:

1. Appellant misconceives the effect of the 1941 Law. The State court on the first appeal merely construed the tolling statute. The rule of law laid down remains unchanged and was not affected by the 1941 Law. There was no reversal by legislative act.

2. Appellant misconceives the effect of a reversal by an appellate court accompanied by a remand for further proceedings. The result is merely to establish the law of the case on one limited issue. It is not even *res judicata*. In that situation, there is no final determination, and the case goes back to the trial court. Upon remand the case stands in the court below the same as if no trial had been had.

Hickey v. *Johnson* (C. C. A. 8) 9 Fed. (2d) 498, where the court said:

> "The Appellate Court passed upon no issues except those presented in the record on appeal. Upon remand,

the case stands in the court below the same as if no trial had been had."

City of Aurora v. *West*, 7 Wall. (U. S.) 82, 19 L. Ed. 42, where the court said, with respect to a judgment reversed and remanded for further proceedings:

> "Certainly the reversal of the judgment * * * is not conclusive evidence that the plaintiff may not ultimately recover. Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action."
>
> See: 34 *C. J.*, sec. 1492, p. 774; sec. 1309, p. 899.

On the first appeal, the Supreme Court of Minnesota said:

> "This record indicates the presence of issues other than that of the tolling of the statute of limitations. If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result."

3. Appellant confuses the doctrine of the "law of the case" with "res judicata." The proposition that the statute was not tolled by appellant's absence became the law of the case. Even so, appellant did not have any "vested right" in the law of the case. Even this rule of law was subject to change on the second appeal if the Supreme Court of Minnesota had seen fit to do so.

Matthews v. *Matthews*, 154 N. Y. 288, 48 N. E. 531;
Messinger v. *Anderson*, 225 U. S. 436, 56 L. Ed. 1152, 32 S. Ct. 730;
King v. *West Virginia*, 216 U. S. 92, 54 L. Ed. 396, 30 S. Ct. 225;
Great Western Telegraph Co. v. *Burnham*, 162 U. S. 339, 40 L. Ed. 991, 16 S. Ct. 850.

Even were we to assume that plaintiff had but one ground of recovery, the decision on the first appeal did not destroy

that ground or right of recovery. This can best be illustrated by a hypothetical situation. Let us assume that the period of limitations fixed by Minnesota Statutes for actions on contracts was ten years which had not run, and, for tort actions six years which had run, and that plaintiff had urged that her action was one on contract and therefore not barred. In such a situation a decision of the appellate court construing the action to be one of tort to which the six year limitation applied, would leave plaintiff in the category of any other claimant or creditor, whose cause of action or debt existed but whose remedy was gone. The appellate court's decision would not in any sense be an adjudication on the merits of plaintiff's claim, and until the case was remanded to the lower court, the correct law applied, and a judgment entered in that court, there would be no adjudication on the merits. Until entry of such final judgment the action would still be pending, subject to the right of the legislature to extend the period of limitations.

4. Appellant misconceives the nature of the decision in the first appeal. It never did acquire any "vested right", because it never obtained a final judgment in its favor on the merits. All it obtained was a judgment for costs on the first appeal. Without a final adjudication in its favor, the doctrine of *res judicata* could have no application.

City of Aurora v. *West*, 7 Wall. (U. S.) 82, 19 L. Ed. 42.

5. Appellant overlooks the fact that the action was still pending when the 1941 Law took effect.

In Minnesota, it is settled that an action "is deemed still pending until its final determination."

Seeger v. *Young*, 127 Minn. 416, at page 419, 149 N. W. 735;

H. L. Spencer Co. v. *Koell*, 91 Minn. 226, 97 N. W. 974.

The authorities uniformly hold that an action is deemed pending until it is finally disposed of, and so long as further judicial action may be required in the suit.

Montoya v. *Gonzales*, 232 U. S. 375, 58 L. Ed. 645, 34 S. Ct. 413;

Wegman v. *Childs*, 41 N. Y. 159;

Clark v. *Roller*, 199 U. S. 541, 50 L. Ed. 300, 26 S. Ct. 141;

Great Western Telegraph Co. v. *Burnham*, 162 U. S. 339, 40 L. Ed. 991, 16 S. Ct. 850;

Ex parte Munford, 57 Mo. 603;

Brown v. *Foss*, 16 Me. 257.

The reversal on the first appeal was an interim determination in the course of this litigation, and before final decision on the merits, that the tolling theory was untenable. It did not extinguish the cause of action. At the time that the case was remanded, the merits were still undecided. Final decision on the merits depended on further proceedings. Appellant at that time acquired no vested immunity from liability by reason thereof.

6. Appellant is in error in urging that the Legislature may not change the law applicable to pending cases.

The matter of change of law applicable to pending actions is wholly within the power of the State courts, and the doctrine of the law of the case merely expresses the practice of courts generally to refuse to reopen what has been decided, but is not a limit on their power.

In *King* v. *West Virginia*, 216 U. S. 92, 54 L. Ed. 396, 30 S. Ct. 225, Mr. Justice Holmes said:

> "The cases remained within the jurisdiction of the state court, and if, by local practice, the lower or higher court had power to change an earlier decree in the cause by direct order, or indirectly, by construction,

which latter we by no means intimate was done, it is a matter that cannot be complained of here. See Patterson *v.* Colorado, 205 U. S. 454, 460, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689. It is said that the decree established the law of the case, but that phrase expresses only the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. Remington v. Central P. R. Co., 198 U. S. 95, 99, 100, 49 L. ed. 959, 963, 25 Sup. Ct. Rep. 577. See Great Western Teleg. Co. *v.* Burnham, 162 U. S. 339, 343, 40 L. ed. 991, 993, 16 Sup. Ct. Rep. 850. In some states it is true that a stricter rule is applied (Northern P. R. Co. *v.* Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724), but *there is nothing in the Constitution of the United States to require it, or to prevent a state from allowing past action to be modified while a case remains in court.* See San Francisco *v.* Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241. *The highest court of the state* is the final judge of the powers conferred by the state laws in that regard." (Italics ours.)

Plainly, appellant's contention that it acquired some vested right by virtue of the decision on the first appeal is without substance and presents no Federal question.

Even appellant's authorities concede that the Legislature possesses the power to affect pending actions.

McCullough v. *Virginia* (1898) 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134;

This court has so held repeatedly.

Dinsmore v. *Southern Express Co.*, 183 U. S. 115, 46 L. Ed. 111, 22 S. Ct. 45;

Union Pacific Railroad Co. v. *Snow*, 231 U. S. 204, 58 L. ed. 184, 34 S. Ct. 104;

Carpenter v. *Wabash Railway Co.*, 309 U. S. 23, 84 L. Ed. 558, 60 S. Ct. 416;

Robinson v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 579. Petition for Writ of Error dismissed, 271 U. S. 649, 70 L. Ed. 1131, 46 S. Ct. 636.

See also: *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033 (where the Legislature lifted the bar after the Supreme Court decision had been handed down, but while the action was still pending).

Legislative interference retrospectively with rights crystallized to a much greater degree than the claimed vested right in this case has been sustained under the due process clause.

Evans-Snider Buel Co. v. *McFaddin* (C. C. A. 8), 105 Fed. 293, affirmed *McFaddin* v. *Evans-Snider Buel Co.*, 185 U. S. 505, 46 L. Ed. 1012, 22 S. Ct. 758 (where rights obtained by an attaching creditor were subjected by a subsequent act to the equity of a prior mortgage invalid because improperly recorded. This court rejected the claim that a retroactive statute deprived the holder of the attachment lien with notice of the prior equity of property without due process).

Carpenter v. *Wabash Ry. Co.*, 309 U. S. 23, 84 L. Ed. 558, 60 S. Ct. 414 (where this court sustained an act granting priority to railroad employees for personal injury damages over other claims in equity receiverships. The act was passed while certiorari was pending in this court from a contrary court decision upon priority).

Paramino Lumber Co. v. *Marshall*, 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600 (where this court sustained a private act of Congress, directing a review from an order for compensation under the Longshoremen's and Harbor Workers' Compensation Act after there

had been a final award and after the time for review of the award had expired).

See also: *Watson* v. *Mercer*, 8 Pet. (U. S.) 100, 8 L. Ed. 876;

Randall v. *Kreiger*, 23 Wall. 137, 23 L. Ed. 124;

Terry v. *Anderson*, 95 U. S. 628, 24 L. Ed. 365.

Ewell v. *Daggs*, 108 U. S. 143, 27 L. Ed. 682, 23 S. Ct. 408;

Louisiana v. *New Orleans*, 109 U. S. 285, 27 L. Ed. 936, 23 S. Ct. 211;

Freeland v. *Williams*, 131 U. S. 405, 33 L. Ed. 193, 9 S. Ct. 763;

Neilson v. *Kilgore*, 145 U. S. 487, 36 L. Ed. 786, 12 S. Ct. 943;

Morley v. *Railway Co.*, 146 U. S. 162, 36 L. Ed. 925, 13 S. Ct. 54;

Demorest v. *City Bank Farmers Trust Co.*, 88 L. Ed. 340.

III.

CLAIM THAT 1941 LAW DENIES APPELLANT EQUAL PROTECTION OF THE LAWS BECAUSE THE LAW APPLIED ONLY TO APPELLANT AND ONE OTHER CORPORATION AND TO SALES MADE ONLY BY THEM (Assignments of Error 4 and 5).

This contention raises no Federal question.

1. The 1941 Law on its face is general and applied to all persons, natural or corporate, resident or non-resident, and to all securities transactions. No arbitrary classification is apparent from the face of the law. Nor is the claim made by appellant that by its terms, any discrimination was intended.

See: *Laws of Minnesota*, 1941, Ch. 547, Sec. 1 (definitions of "person", "security", "broker", and "investor").

2. The contention rests on appellant's misinterpretation of what the court actually said in its opinion. It did not say nor hold that the law was limited in its application to appellant and National City Company and to sales of unregistered securities by them. On the contrary, it specifically referred to a "multitude of sales of this and *other* unregistered stock". It also said: "That it (the Legislature) had all the cases *similar* to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered."

Published reports of adjudicated cases contain reference to similar claims against other security dealers arising out of transactions in Minnesota.

Sivertsen v. *Bancamerica-Blair Corporation*, 43 Fed. Supp. 233;

Babcock v. *Bancamerica-Blair Corporation*, 212 Minn. 428, 4 N. W. (2d) 89.

Judicial notice by this Court of the calendars of its inferior courts would disclose similar suits against others.

See: *Collins* v. *Chase Securities Corporation, Dillon Read & Company, et al.* (U. S. D. C., Minn. 4th Div. No. 146 Civil);

Case v. *Blythe & Co.* (U. S. D. C., Minn. 4th Div. No. 731 Civil).

3. Notice by the court of the circumstances and reason leading up to the enactment of the 1941 law was proper in confirmation and support of the clear meaning of the words, regarded by the State court as clear and without ambiguity. It specifically said that, "the circumstances under which the law was enacted support the indicated purpose", which was "expressed in clear language without qualification."

Donaldson v. *Chase Securities Corporation* (Minn.) 13 N. W. (2d) 1, 4;

See: *U. S.* v. *Missouri Pacific Ry. Co.*, 278 U. S. 269, 73 L. Ed. 377, 46 S. C. 133.

By referring to the litigation of record involving appellant and National City Company, the State Court was pointing to some of the circumstances which led to the enactment of the law. Conditions which lead to passage of legislation need not be universal, and affect everyone alike. A specific instance, or special circumstances prompting the Legislature to pass a general law, do not compel a construction that the general law is special. Otherwise, most general laws would be construed as special, because most general laws are prompted by specific instances. Appellant confuses the specific occasion which sets the legislative process in motion with general application of the law enacted.

4. Far from denying appellant equal protection of the laws, the 1941 Law in important respects conferred upon appellant advantages which it did not theretofore enjoy. At the end of the one-year period, undiscovered or unasserted claims against appellant based on representation of registration implied from the sale, or concealment of non-registration, were no longer subject to limitations dating from discovery. At the end of the one-year period, all such claims were governed by the six-year limitation statute, dating from date of delivery of the security and not from date of discovery of the fraud. Elimination of limitations dating from discovery was an advantage it did not theretofore enjoy.

5. The question was not raised until after the Supreme Court decided this case on the only two issues tendered by appellant for decision, namely, (1) intent of the Legislature to lift the bar, and (2) power of the Legislature to lift the bar.

The following quoted portion from page V of the Index to Appellant's Brief in the State Supreme Court shows that it made no other contentions on appeal:

> "V. The 1941 Statute Does not Revive Any Outlawed Cause of Action which Plaintiff May have had.
>
> 1. No legislative intention to revive barred action is shown.
>
> 2. There is no constitutional power to revive barred actions."

The claim, in any event, cannot be considered now, because it was not raised until the Petition for Re-hearing.

American Surety Co. v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98.

The 1941 Law is a general and not a special law. It applies to all violators and not alone to appellant and National City Company or to sales made only by them.

IV.

Claim that Appellant was Denied a Fair Trial (Assignment of Error 6)

For the first time, appellant, in its Petition for Re-hearing, claimed that it was denied due process of law because it was not given an opportunity to offer extraneous evidence as to legislative intent.

Aside from the fact that this court will not consider contentions made for the first time in a petition for rehearing to the state court, where the petition is denied without opinion.

Godchaux Co. v. *Estopinal*, 251 U. S. 179, 64 L. Ed. 213, 40 S. Ct. 116;

American Surety Co. v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98,

appellant was not denied due process, because

1. Appellant had its day in court and several opportunities to be heard after due notice of the issue, but did not see fit to take advantage thereof.

Appellant offered no evidence on this issue to the trial court. It certainly was aware then of plaintiff's contention that the 1941 Law applied to this case. (See plaintiff's Motion for Supplemental Findings, May 16, 1941.) After the trial court filed its findings in favor of plaintiff on this point, among others (Appendix "B", par. XXXII) appellant must have been aware then that the court had held that the Legislature had intended the 1941 Law to be applicable to cases of this nature. Still it offered no evidence. In its briefs on appeal to the state Supreme Court, appellant submitted the issue of legislative intent on the record as made, without offering anything more. The first time appellant advanced its present claim of lack of due process was in its application for re-hearing after the unanimous decision by the state Supreme Court against it.

In this connection, appellant made an attempted offer of proof in the Supreme Court, which was irregular and untimely.

Smith v. *St. Paul*, 69 Minn. 276, 72 N. W. 104, 210.

It never claimed and does not now claim that the alleged proof was previously unavailable to it or was newly discovered.

Due process is not denied if litigants are afforded an opportunity to be heard at any time before final judgment is entered.

Wilson v. *Standefer*, 184 U. S. 399, 46 L. Ed. 612, 22 S. Ct. 384;

Cf. Am. Surety Co. v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98;

12 *Am. Jurisprudence, Constitutional Law*, Sec. 611, p. 305;

16 *C. J. Sec.*, Sec. 567 b.

2. Where a statute is clear and unambiguous, extraneous materials are inadmissible.

The state court explicitly held that the plain meaning of the 1941 Law required a construction that the Legislature intended to lift the bar of limitations as to causes of action more than five years old. It said in its opinion:

> "The purpose is expressed in *clear* language without qualification."

The references to significant circumstances leading up to the enactment of the 1941 Law were confirmatory of the plain meaning of the words used. Under these circumstances, the alleged extraneous evidence could not have been received.

Precisely the same situation was before this court in *United States* v. *Missouri-Pacific Ry. Co.*, 278 U. S. 269, 73 L. Ed. 322, at 377, 49 S. Ct. 133,

where legislative materials, statements by those in charge of the measure, and other like extraneous matter were offered in evidence in the lower court by appellant. This court drew a distinction between the permitted use of such material in construing an ambiguous statute and the forbidden use thereof to add to or take away from the significance of words used in an unambiguous statute. This court said:

> "Appellants seek to support the view for which they contend by some of the legislative history of the enactment and especially by explanatory statements made by Senator Elkins in connection with the report of the majority of the Senate committee submitting the bill.

for the act in question. Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 325, 41 L. ed. 1007, 1022, 17 Sup. Ct. Rep. 540; Pennsylvania R. Co. v. International Coal & Min. Co., 230 U. S. 184, 199, 57 L. ed. 1446, 1452, 33 Sup. Ct. Rep. 893, Ann. Cas. 1911 A, 315; Mackenzie v. Hare, 239 U. S. 299, 308, 60 L. ed. 297, 300, 36 Sup. Ct. Rep. 106, Ann. Cas. 1916E, 645; Caminetti v. United States, 242 U. S. 490, 61 L. ed. 455, L. R. A. 1917 F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168."

The rule against use of legislative materials for the purpose of construing a statute contrary to its plain terms does not constitute a denial of due process.

See: *Pennsylvania R. Co. v. International Coal & Min. Co.*, 230 U. S. 184; at 189, 57 L. Ed. 1446, at 1452, 33 S. Ct. 893.

This is in accord with the rule long followed in Minnesota.

See: *Dunnell's Minnesota Digest*, Sec. 8938.

In *Oppegaard v. Board of Commissioners*, 120 Minn. 443, 139 N. W. 949, the Minnesota Supreme Court held that:

"extrinsic facts can be resorted to in aid of construction only where the intent cannot clearly be ascertained from the statute; and that when we ascertain the true sense of words, the same being their apparent and obvious meaning, we should not seek for others."

3. The state court's reference to circumstances and background of the 1941 Law as confirmatory of the plain meaning of an unambiguous statute was permissible.

With respect to the claim urged by appellant herein that the state court denied it due process because it judicially noticed the obvious circumstances and reasons leading up to the enactment of the 1941 Law, this court in *United States* v. *Missouri-Pacific Ry. Co., supra,* said:

> "But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used. Johnson v. Southern P. Co., 196 U. S. 1, 19, 21, 49 L. ed. 363, 370, 371, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 Sup. Ct. Rep. 671; Northern P. R. Co. v. Washington, 222 U. S. 370, 380, 56 L. ed. 237, 240, 32 Sup. Ct. Rep. 160; McLean v. United States, 226 U. S. 374, 381, 57 L. ed. 260, 263, 33 Sup. Ct. Rep. 122."

This court has on numerous occasions taken judicial notice of the reasons and circumstances leading up to the enactment of statutes where constitutional questions were involved.

See: *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 255, 54 S. Ct. 231; *Railroad Retirement Board* v. *Alton Ry. Co.,* 295 U. S. 330, 79 L. Ed. 1468, 55 S. Ct. 758.

Here, as in *United States* v. *Missouri Pacific Ry. Co.,* supra, the reference to the reasons and circumstances leading up to the enactment of the 1941 Law was confirmatory of the clear meaning. With respect to this point, the state court said in its opinion:

> "That purpose is expressed in clear language without qualification, and the circumstances under which the law was enacted support the indicated purpose."
>
> *Donaldson* v. *Chase Securities Corporation* (Minn.), 13 N. W. (2d) 1, 4.

4. Even if a timely offer of proof had been made, the extraneous matter would have been incompetent and totally lacking in evidentiary value.

The alleged offer of proof by its contents clearly demonstrates the frivolous character of this contention. It consisted of 1) affidavits, which showed that the legislative minutes were silent with respect to the matter of lifting the bar; and 2) affidavits of two members of the Legislature and of the Securities Commissioner, who collaborated with the Investment Bankers Association in drafting the 1941 Law that *they* had no such intention. The statements were clearly statements of private intention and no claim was made that there were any public statements to that effect.

The whole offer of proof was incompetent. The minutes of the Legislature, admittedly silent, throw no light whatever on the question of intention. But what is more important, the offer of proof in this respect violates the well settled rule that "in determining the intention of the Legislature, the intention or motives of individual members cannot be considered."

6 *Dunnell's Minn. Dig.*, Sec. 8941;
Jewell v. *Weed*, 18 Minn. 272 (247);
State v. *City of Lake City;* 25 Minn. 404;
State ex Rel. Rose Bros. v. *Clousing*, 198 Minn. 35, 268 N. W. 844;
Soon Hing v. *Crowley*, 113 U. S. 703, 28 L. Ed. 1145;
2 *Lewis-Sutherland Statutory Construction*, Sec. 496;
McQuillin, Municipal Corporations (2d Ed.), Sec. 739.

In the *Soon Hing* case, *supra*, this court said:

"The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the

> Acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. *The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.*"

In *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 41 L. Ed. 1007, at 1020, 17 S. Ct. 540, this court expressed its views with respect to the admissibility of statements by individual members of Congress, as follows:

> "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. United States v. Union P. R. Co., 91 U. S. 72, 79 (23:224, 228); Aldridge v. Williams, 44 U. S. 3 How. 9-24 (11:469-475), Taney, Ch. J.; Mitchell v. Great Works Milling & Mfg. Co., 2 Story, 648, 653; Reg. v. Hertford College, L. R. 3 Q. B. Div. 693, 707.
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

Due process of law does not require that a litigant have the right to conduct a plebiscite among the individual legislators who enacted a statute applicable to his case, where the

State court has held that the meaning of the statute is clear.

5. In any event the matter of construction of state statutes and of admissibility of evidence in aid of construction thereof rests finally with the state court.

The State court has construed and interpreted the 1941 Law. By its denial of appellant's application for re-hearing, it rejected appellant's so-called offer of proof.

Right or wrong, this construction presents no constitutional question. This Court has repeatedly dismissed appeals for the reason that it considers itself bound by the construction and interpretation of State statutes by State courts.

Roe v. *Kansas, supra,* and
Cases cited in Subdivision I (a) (1) hereof.

This Court will not review the question of admissibility of evidence in the State court.

Chaplinsky v. *State of New Hampshire,* 315 U. S. 568, 86 L. Ed. 1031, at 1036, 1037, 62 S. Ct. 766,

where this Court said:

"Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied does not contravene the Fourteenth Amendment."

Procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of State regulation and control.

Hardware Dealers Mutual Fire Ins. Co. of Wis. v. *Glidden Co.,* 284 U. S. 151, 76 L. Ed. 214, 52 S. Ct. 69.

Assignment of Error 7 is too general to present any issue.

Conclusion.

Appellees respectfully submit that no Federal questions have been raised by appellant, and it is urged that appellant's Petition for Appeal be dismissed.

Appellees further respectfully submit that, even if this Court should hold that Federal questions are involved, they are of no merit or substance, and appellees' motion to dismiss or affirm should be granted.

Respectfully submitted,

LEONARD, STREET, AND DEINARD,
GEORGE B. LEONARD,
HYMAN EDELMAN,
Minneapolis, Minnesota;
S. P. GISLASON,
New Ulm, Minnesota,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, now known as Amerex Holding Corporation,

Appellant,

vs.

RUTH CHASE DONALDSON (Frank A. Donaldson and Frank A. Donaldson, Jr., executors of the Estate of Ruth Chase Donaldson, deceased), Substituted as Respondents,

Appellees,

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

Now come Frank A. Donaldson and Frank A. Donaldson, Jr., Executors of the Estate of Ruth Chase Donaldson, deceased, Appellees in the above entitled case, by their attorneys of record, and move that the appeal herein be dismissed, or that the judgment sought to be reviewed herein be affirmed.

LEONARD, STREET, and DEINARD,
GEORGE B. LEONARD,
HYMAN EDELMAN,
Minneapolis, Minnesota, and
S. P. GISLASON,
New Ulm, Minnesota,
Attorneys for Appellees.

APPENDIX "A".

No. 11453

CITY CO. OF NEW YORK, INC.

v.

STERN

Circuit Court of Appeals, Eighth Circuit.

March 18, 1940.

REHEARING DENIED APRIL 6, 1940.

1. *Licenses.*

Sales of corporate stock in violation of the Minnesota Blue Sky Law are illegal and void and there is an obligation raised by law on the part of the seller to refund money procured by means of such sales. Mason's Minn. St. 1927, § 3996-1 et seq.

2. *Limitation of actions.*

Where only defense to right to recover on ground of violation of Minnesota Blue Sky Law was the statute of limitations, the statute began to run on the date of sale of corporate stock involved. Mason's Minn. St. 1927, § 3996-1 et seq.

3. *Limitation of actions.*

Where New York corporation when licensed to do business in Minnesota appointed Securities Commissioner its attorney for service of process but surrendered its license in August, 1934, and filed a resolution of withdrawal from state and irrevocably appointed Secretary of State attorney for service of process and removed from Minnesota its offices and representatives, the corporation "departed" from and "resided out of" Minnesota and the subsequent period was a "time of absence" within statute providing that if any person "departs" from and "resides out of"

the state the time of his absence is not part of time limited for commencement of action, so that action instituted in November, 1937, for violation of Minnesota Blue Sky Law in sale of corporate stocks in 1920 was not barred by six-year statute of limitations, notwithstanding that corporation remained amenable to process in Minnesota. Mason's Minn. St. 1927, §§ 3996-1 et seq., 7494, 9191, 9200.

See Words and Phrases, Permanent Edition, for all other definitions of "Departs", "Resides Out of" and "Time of Absence".

4. *Corporations.*

A corporation is present in a state only when it is represented there by its officers or agents with some measure of authority to act for it.

5. *Courts.*

Consent to the jurisdiction of the courts of a state by an individual or corporation residing outside the state implies neither presence nor residence within the state, since jurisdiction of courts to determine controversied does not necessarily depend upon residence of parties within the territorial jurisdiction of court.

6. *Courts.*

A citizen of a foreign state may maintain an action in the courts of another state and with his consent he may be sued where he does not reside and is not present. U. S. C. A. Const. art. 4, § 2.

7. *Courts.*

All the parties may be nonresidents of the state where action is brought.

8. *Limitation of actions.*

Where Minnesota tolling statute unequivocally provided that, if after cause of action accrued against a person he departed from and resided out of the state, the time of his

absence was not part of time limited for commencement of action, federal court had no power to read into the unambigous language of the statute an exception based on amenability to service of process in Minnesota. Mason's Minn. St. 1927, § 9200.

9. *Courts.*

Decision of Minnesota Supreme Court construing the Minnesota tolling statute was binding on federal court, but decisions of Minnesota District Courts were not controlling but might be considered. Mason's Minn. St. 1927, § 9200.

Woodrough, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Minnesota; Matthew M. Joyce, Judge.

Action by Jay S. Stern against the City Company of New York, Incorporated, to recover the purchase price of twenty shares of capital stock of the National City Bank of New York, with interest. From a judgment for plaintiff, 25 F. Supp. 948, defendant appeals.

Affirmed.

M. J. Doherty, of St. Paul, Minn. (W. E. Rumble and Doherty, Rumible, Butler, Sullivan & Mitchell, all of St. Paul, Minn., on the brief), for appellant.

Benedict S. Deinard, of Minneapolis, Minn. (George B. Leonard, Hyman Edelman, and Leonard, Street & Deinard, all of Minneapolis, Minn., on the brief), for appellee.

C. E. Phillips and Phillips, Sherwood & Hughes, all of St. Cloud, Minn., amicus curiae for Investment Bankers Ass'n of America, Minnesota Division.

T. O. Streissguth, of New Ulm, Minn., amicus curiae.

G. A. Youngquist and Fowler, Youngquist, Furber, Taney & Johnson, all of Minneapolis, Minn., amicus curiae.

Before Stone, Woodrough, and Thomas, Circuit Judges.

THOMAS, Circuit Judge:

The question presented on this appeal is whether the appellee's cause of action is barred by the statute of limi-

tations. The appellant, a New York Corporation, and defendant below, sold to the plaintiff, a citizen of Minnesota, in four installments 20 shares of the capital stock of the National City Bank of New York coupled with a beneficial interest in the stock of the defendant corporation and in the stock of City Bank Farmers Trust Company. The first sale for 5 shares was made on February 4, 1929; the second for 5 shares on April 4, 1929; the third for 5 shares on July 12, 1929; and the fourth for 5 shares on October 16, 1929. This suit to recover the purchase price of the stock with interest was commenced in the district court November 12, 1937, more than six years after the dates of the sales. The right of recovery was based on the grounds (1) that the sales were illegal and void because the stocks were not registered as required by the Blue Sky Laws of Minnesota, Mason's Minn. St. 1927, § 3996-1 et seq., and (2) that there was fraud, both actual and implied, in the sales. The defendant pleaded the statute of limitations and denied fraud. The plaintiff tendered into court the stock and the dividends received thereon; a jury was waived by stipulation; and the court found in favor of the plaintiff and rendered judgment for the purchase price of the stock and interest less the dividends. Stern *v.* National City Company of New York, D. C., 25 F. Supp. 948.

Section 9191 of the 1927 Statutes of Minnesota prescribes a six-year limitation for causes of action upon contract, upon a liability created by statute, and for relief on the ground of fraud "in which case the cause of action shall not be deemed to have accrued until the discovery" of the fraud.

Section 9200 of the statute provides that "* * * if, after a cause of action accrues [against a person], he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action."

The six-year period had expired before this action was begun; but the plaintiff contends, and the court held, that (1) the period of limitation was tolled by the departure of the defendant from and its residence out of the state since

1934, and (2) that for the cause of action based upon fraud the six-year period did not begin to run until the fraud was discovered just before the commencement of this suit.

The facts upon which plaintiff bases his claim that the six-year statute was tolled are not in dispute. The defendant was a New York corporation engaged in business as a dealer in bonds, stocks and other securities. It was licensed to do business in Minnesota as a foreign corporation in 1917, and on August 13 of that year it was licensed as a dealer or broker under the Blue Sky Law of the state. Pursuant to successive annual applications it continued to operate as such broker until August 9, 1933. In connection with its license as a broker defendant in compliance with law filed a power of attorney irrevocably appointing the Commissioner of Securities its attorney for the service of process in any action involving any transaction covered by the Blue Sky Law. Service in this case was made on the Commissioner.

On August 23, 1934, the defendant surrendered its license to carry on business in the state as a foreign corporation. In compliance with section 7494 of the Minnesota statutes it filed at that time in the office of the Secretary of State a "Resolution of Withdrawal" from the state and irrevocably appointed the Secretary of State attorney for the service of process upon it in any action arising out of any business done by it while licensed to do business in the state.

Having thus formally withdrawn from doing business in the state the defendant removed from the state its offices, agents and representatives which it had maintained there during the period covered by its license.

[1, 2] It is conceded that the sales were in violation of the Minnesota Blue Sky Law. Putting to one side the alleged fraud as a basis of recovery, it is settled that such sales are illegal and void and that there is an "obligation raised by law" on the part of the appellant "to refund the money procured by means" of such sales. Webster v. United States I. Realty Co., 170 Minn. 360, 212 N. W. 806, 807; Vercellini v. United States I. Realty Co., 158 Minn. 72, 196 N. W. 672; Drees v. Minnesota Petroleum Co., 189

Minn. 608, 250 N. W. 563. The only defense to the right to recover solely on the ground of violation of the Blue Sky Law is the statute of limitations. The statute began to run on the date of the sales. Burzinski v. Kinyon Investment Co., 192 Minn. 335, 256 N. W. 233, 236; Olesen v. Retzlaff, 184 Minn. 624, 238 N. W. 12, 239 N. W. 672, 78 A. L. R. 891. Unless, therefore, the six-year period was tolled by defendant's surrender of its license to do business in Minnesota and its withdrawal therefrom in 1934, the cause of action for recovery for violation of the Blue Sky Law was barred when this suit was commenced in 1937. Whether the limitation was tolled or not depends upon the proper construction and application of section 9200 of the 1927 Minnesota statutes, supra.

It is the contention of the plaintiff, that the tolling statute must be construed literally, and that when so construed the defendant by withdrawing from the state departed therefrom, that it resided out of the state thereafter and that it has been absent therefrom ever since. It is the contention of the defendant that the statute should not be construed literally but with reference to its intent and that when so construed the defendant remained in the state within the meaning of the statute so long as it was amenable to process therein by service upon its designated attorney, either the Secretary of State or the Commissioner of Securities.

[3, 4] Under section 9200 the period of limitation is tolled when the party liable "departs from and resides out of the state" *diramg* "the time of his absence." Literally construed we think there is no doubt that the defendant "departed" from the state when it ceased to do business therein, cancelled its license, filed its resolution of withdrawal and removed its offices and representatives from the state. Since that time it has been literally "absent" from Minnesota and, in so far as Minnesota is affected, it has thereafter "resided" in New York, the state of its creation. When it departed it left no officer or agent in the state with authority to represent it in any business transaction whatever. The Secretary of State and the Commissioner of Securities, its designated attorneys for

service of process, are its agents in no such sense as to represent the continued corporate presence of the defendant in the State of Minnesota. They are merely the instrumentalities through which the defendant is subject to service in certain types of actions. Their presence in the state is not the presence of the corporation. A corporation is present in a state only when it is represented there by its officers or agents with some measure of authority to act for it. Kendall v. Orange Judd Co., 118 Minn. 1, 136 N. W. 291. In the case of Garber v. Bancamerica-Blair Corporation, 205 Minn. 275, 285 N. W. 723, 726, the Supreme Court of Minnesota quoted with approval from Gaboury v. Central Vermont Ry. Co., 250 N. Y. 233, 237, 165 N. E. 275, 277, the statement that "presence within the state imports the use of corporate power by corporate representatives." In this instance the powers of attorney filed by appellant designating the Secretary of State and the Commissioner of Securities as its attorneys for the service of process in a limited and restricted class of proceedings conferred no authority upon them as agents to use its corporate powers for any purpose.

Nor can the defendant be said to reside and be present in Minnesota merely by reason of the fact that it remains subject to the jurisdiction of her courts in certain classes of actions. In this instance the right of the state to acquire jurisdiction in personam over the departed corporation in a limited class of actions does not rest on the basis of a fiction of continued presence in Minnesota but upon the defendant's express consent to accept service through designated attorneys. Neirbo Company et al v. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. —, Decided November 22, 1939; Oklahoma Packing Co. et al. v. Oklahoma Gas & Electric Co. et al., 60 S. Ct. 215, 84 L. Ed. —, decided January 15, 1940; Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610; Morris & Co. v. Skandinavia Ins. Co., 7 Cir., 81 F. 2d 346; Bagson v. Philadelphia & Reading Coal & Iron Co., 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389; Magoffin v. Mutual Reserve Fund Life Ass'n, 87 Minn. 260, 91 N. W. 1115, 94 Am. St.

Rep. 699; McClamroch v. Southern Surety Co., 193 Iowa 249, 187 N. W. 41; Restatement of Conflict of Laws, §91. It arises out of a contract between the defendant and the State of Minnesota made by the state for the benefit of its citizens and not for the benefit of the defendant. Magoffin v. Mutual Reserve Fund Life Ass'n, supra, 91 N. W. at page 1116; Bagson *v.* Philadelphia & Reading Coal & Iron Co., supra. The contract might have provided that in its absence from the state the defendant would remain amenable to service of process by mail or otherwise in such personal actions. Restatement of Conflict of Laws, §§ 81, 90.

[5, 6] Consent to the jurisdiction of the courts of a state by an individual or corporation residing outside the state implies neither presence nor residence within the state. Jurisdiction of courts to determine controversies does not necessarily depend upon the residence of the parties within the territorial jurisdiction of the court. A citizen of a foreign state may maintain a suit in the courts of another state (Constitution Art. 4, §2; Canadian Ry. Co. v. Eggen, 252 U. S. 553, 560, 40 S. Ct. 402, 64 L. Ed. 713) and, with his consent, he may be sued where he does not reside and is not present. Pennoyer v. Neff, 95 U. S. 714, 735, 24 L. Ed. 565. All the parties may be nonresidents of the state where suit is brought. Neirbo Company v. Bethlehem Shipbuilding Corporation, supra.

[7] The problem to be determined therefore, is whether the Minnesota tolling statute may be construed as not applicable to the defendant corporation notwithstanding that literally and in point of actual fact the defendant has departed from, resided out of, and remained absent from, that state since 1934. Stated otherwise, we must determine whether the fact that the defendant remained amenable to service of process in Minnesota authorizes us to read an exception into the literal terms of the Minnesota tolling statute. The general purpose of such statutes is well known. But the language of this statute is unequivocal and expresses no qualifications or exceptions. Had the Minnesota legislature intended to make non-amenability to service the test of the tolling of limitations it could easily have done so. Some states have added such an ex-

ception. See New York Civil Practice Act, §19, construed in Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N. Y. S. 2d 749; Id., 278 N. Y. 576, 16 N. E. 2d 110. But unless authority may be found in some controlling Minnesota decision we have no power to read into the unambiguous language of the statute an unexpressed intent of the legislature. If the statute seems to operate inconsistently with its probable intent the power to amend it is in the Minnesota legislature and not in a federal court.

The defendant contends, however, that within the intendment of section 9200 it did not in 1934 "depart from" the state and has not since "resided out of" it, and the subsequent period has not been a "time of absence" from the state. Its argument is not that these things are not literally true but that the whole matter of corporate presence and residence is at most a fiction and that since it remains amenable to process it should be held to have retained a constructive presence in Minnesota so as not to fall within the spirit of the tolling section even though it may be said to be within its literal terms. The decisions of the courts of other jurisdiction are in conflict upon the principle of construction advocated by defendant, and no useful purpose would be served in reviewing them here. The Minnesota decisions relied on to support defendant's theory are City of St. Paul v. Chicago, M. & St. P. Ry. Co., 1891, 45 Minn. 387, 48 N. W. 17; and American Loan & Investment Co. v. Boraas, 1923, 156 Minn. 431, 195 N. W. 271.

In the St. Paul case, supra [45 Minn. 387, 48 N. W. 21], it was contended that a foreign corporation cannot have the benefit of the statute of limitations, although authorized to do business in the state, for the reason that such corporation is "out of the state." The court, although the decision is not based upon that point, said that under such circumstances a foreign corporation is not "out of the state"; and in discussing that situation the court said: "The mere theoretical domicile of a corporation in another state, by reason of its having been created under the laws of such state, does not make it out of the state, any more than does the theoretical domicile of a natural person make him out of the state where it is practically within the state

for all the purposes of its courts acquiring full and complete jurisdiction over it. The purpose of the statute of limitations in allowing specified times for commencing actions, and in making exceptions to the running of such times is a practical one. It is to give to plaintiff what the legislature deemed a reasonable opportunity to seek a remedy. No mere theoretical absence from the state, not preventing in any way a full and complete remedy for the times specified, can have been intended by section 15." Mason's Minn. St. 1927, § 9200.

As applied to the facts of that case no one could doubt the applicability of this language. In that case the defendant was not only authorized to do so, but it was actually carrying on business in the state and therefore was present within its jurisdiction. It was not absent merely because it was created under the laws of another state. But as applied to the facts in the instant case the language there used loses much if not all of its force even if it were not dicta. Cohens v. Virginia, 6 Wheat. 264, 399, 19 U. S. 264, 398, 5 L. Ed. 257; Harriman v. Northern Securities Co., 197 U. S. 244, 291, 25 S. Ct. 493, 49 L. Ed. 739.

In the Boraas case, supra, the American Loan & Investment Co., a North Dakota corporation, complied with the Minnesota corporation laws and was authorized to do business therein. While so authorized and while actually engaged in carrying on business in the state it brought suit in the Minnesota court against Boraas. Thereafter it formally withdrew from the state. Boraas thereupon amended his answer and interposed as a plea in abatement the withdrawal of the plaintiff from the state, the surrender of its certificate and the fact that the company had ceased to do business in the state. The plea was sustained. The Supreme Court reversed on appeal and in the course of the opinion said [156 Minn. 431, 195 N. W. 272]: "Notwithstanding the steps taken in that respect [withdrawal] the corporation, as to all unadjusted transactions theretofore entered into with citizens of the state, remained in this state, in contemplation of law, subject to the jurisdiction of its courts by the service of process in the manner provided by the license."

It will be noted in this case that neither the statute of limitations nor the tolling statute was involved. The suit was begun by the corporation before it withdrew from the state. As applied to the facts of the case the language quoted means only that after a foreign corporation has "withdrawn" from the state it remains "amenable", that is, "subject to the jurisdiction of its courts by the service of process in the manner provided by the license." The statement does not unequivocally mean that the corporation remains a resident of the state. Such an interpretation of the decision is in conflict with the later pronouncement of the Supreme Court of Minnesota in the Garber case, supra.

The effect upon the tolling statute of amenability to service of process was not decided in either of the two cases, supra, relied upon the defendant. There are two other decisions of the Supreme Court of Minnesota which we think are more nearly in point than the cases cited above, and which control decision in this case.

In Venable v. Paulding, 19 Minn. 488, Gil. 422, the defendant, a natural person, had departed from Minnesota and during the nine years of his absence was not amenable to the service of process within the state. The court held that this fact did not prevent the statute of limitations from running if in fact the defendant retained his Minnesota domicile during a portion of the time of his absence. The Minnesota Supreme Court thus gave a literal interpretation to the tolling statute with no attempt to make its application depend upon the test of the defendant's amenabiliy or non-amenability to service of process within the state.

In Rigers v. Benton, 39 Minn. 39, 38 N. W. 765, 767, 12 Am. St. Rep. 613, the issue of whether amenability to service of process affected the application of the tolling section was again before the Minnesota Supreme Court. In that case a mortgagor left the state and resided permanently in another state, but his family continued to reside in the state at the homestead on the mortgaged premises. The issue was whether limitations had been tolled so as to permit an action to foreclose. The court, in determing

that such absence tolled the running of the statute of limitations against the right of action to foreclose, said: "This brings us to the first important legal question in the case, viz., whether the right to foreclose by action still continued when the Conants went into possession, June 1, 1876. This cause of action accrued against Benton in December, 1858, and under Laws 1870, c. 60, would have been barred September 8, 1870, unless saved from the operation of the statute by his departure from and residence out of the state. It has been determined that the exception in section 15, c. 66, Gen. St. 1866 [section 9200 Statutes of 1927], from the time limited for commencing actions, of the time during which the defendant resides out of the state, applies to an action to foreclose a mortgage upon real estate. * * * his absence was a permanent change of residence, and, if so, it was of no legal importance that his family remained behind. The fact that Conant might, notwithstanding the new residence of the mortgagor, have resorted to substituted service of the summons, would not take the case out of the statutory exception."

[8] In this case the court was considering the identical question presented on this appeal, and it held that mere amenability to service of process within the state upon one against whom a cause of action had accrued and who thereafter departs from and resides out of the state does not take the cause of action out of the exception to limitations contained in section 9200. The decision does not, of course, declare that substituted service upon a nonresident would be valid in every instance. Its purport is that assuming such service to be valid it would not take the case out of the statutory exception. In other words, the decision holds that in a case where the defendant is a natural person the words "departs from and resides out of" the state are to be construed literally and that possible amenability to service of process does not permit an exception to the tolling statute. This decision of the Minnesota Supreme Court is the only one squarely in point on the construction of the tolling statute, and it is binding on the federal court.

[9] While the decisions of the district courts of Minnesota as to the interpretation of its statutes are not control-

ling on the federal court, the reasoning of such decisions is often persuasive and even convincing. In this instance we are in accord with three Minnesota district court decisions which have been called to our attention, and in which section 9200 is construed to apply to a foreign corporation after it has withdrawn from the state. Coleman v. City Company of New York, D. C. Ramsey County; Samsen v. National City Company, D. C. Brown County; Seifert v. National City Company, D. C. Brown County.

In view of the conclusion which we have reached upon the first issue it is not necessary to extend this opinion with a discussion and determination of the contentions of the parties in respect of fraud.

Affirmed.

WOODROUGH, Circuit Judge (dissenting).

My conclusion is contrary to that reached by the majority of the court. It seems to me that the six-year statute of limitations was not tolled in this case. The corporation defendant complied with Section 7494 of the Minnesota Statutes and so remained at all times throughout the limitation period completely amenable to process upon its agent in the state. The literal wording of the tolling statute (Sec. 9200) does not extend to corporations at all without judicial reasoning and I think that there is no sound basis in reason for deciding that the statute was tolled. Neither do I find a basis for so deciding in the expressions which the Supreme Court of Minnesota used when it was not thinking or talking about corporations, but was passing on suits against individual persons who had departed from and were living in the flesh outside of the state beyond the reach of personal process.

In addition to the vast array of learning and authority able counsel for the defendant have presented against the claim that the statute was tolled, I am impressed that Section 7494 itself indicated legislative intent that the statute of limitations should not be tolled against the corporations which avail themselves of its provisions and on quitting business designate their agents for service in the state. It says that the agency shall continue as long as any cause of action

survives against the corporation and I take that to imply that the survivor shall be no longer on account of anything done by corporations under the authority of the statute.

I would reverse.

CHASE SECURITIES CORPORATION

v.

VOGEL.

No. 11469.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

March 18, 1940.

Rehearing Denied April 6, 1940.

Limitation of actions.

Where New York corporation licensed to do business in Minnesota appointed Minnesota Commissioner of Securities its attorney to accept service of process, made sale of corporate stock in May, 1929, in June, 1931, filed resolution of withdrawal and removal from state and appointed Secretary of State its attorney to accept service of process and in July, 1931, had its license canceled, action instituted in October, 1935, to recover purchase price of stock for violation of Minnesota Blue Sky Law was not barred by six-year statute, since the corporation's departure from state tolled the statute of limitations. Mason's Minn. St. 1927, secs. 3996-1 et seq., 9191, 9200.

Woodrough, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Minnesota; Matthew M. Joyce, Judge.

Action by Joseph H. Vogel against the Chase Securities Corporation to rescind sale to plaintiff by defendant of shares of corporate stock, and for the purchase

price of the stock with interest. Judgment for plaintiff, and defendant appeals.

Affirmed.

F. H. Stinchfield and John M. Palmer, both of Minneapolis, Minn. (Stinchfield, Mackall, Crounse, McNally & Moore, of Minneapolis, Minn., on the brief), for appellant.

T. O. Streissguth, of New Ulm, Minn., and Hyman Edelman, of Minneapolis, Minn. (George B. Leonard, of Minneapolis, Minn., Streissguth & Gislason, of New Ulm, Minn., and Leonard, Street, and Deinard, of Minneapolis, Minn. on the brief), for appellee:

Before Stone, Woodrough, and Thomas, Circuit Judges.

THOMAS, Circuit Judge:

This is an action at law brought by Vogel against appellant in the state court of Minnesota and removed by appellant, a corporation organized under the laws of New York, to the district court. The plaintiff prayed that the court rescind a sale to him by defendant on May 7, 1929, of 50 shares of the capital stock of the Chase National Bank of New York and an equal number of shares of the capital stock of the defendant corporation, and for judgment for the purchase price of the stock in the amount of $10,250, with interest. By stipulation of the parties a jury was waived and the case tried to the court. A judgment was entered for the plaintiff, and the defendant appeals.

This case is a companion to No. 11453, City Company of New York v. Stern, 8 Cir., 110 F. 2d 601, decided at this term.

The action was begun October 14, 1935, more than six years after the date of the sale of the stock.

The grounds upon which the plaintiff claimed the right to rescind the sale and recover the purchase price of the stock are: (1) That the sale was in violation of the Minnesota Blue Sky Law, giving rise (a) by reason of the violation of the act itself to the right to rescind and recover the purchase price, or (b) to the right to recover for implied or concealed fraud; and (2) that defendant's salesman had made certain false and fraudulent statements in connection with the sale

amounting to actual fraud. The defendant (1) denies fraud and (2) relies upon the statute of limitations. The plaintiff, as to the statute of limitations, claims (1) that it was tolled by defendant's departure from the state before the six-year period had elapsed and (2) that it did not begin to run until the fraud was discovered by plaintiff a few months before suit was commenced.

Except as to the question of actual fraud the issues are the same issues in No. 11453, City Company of New York v. Stern, supra. As in the Stern case, an affirmance on the ground that the statute of limitations was tolled by the departure of the defendant from the state of Minnesota, prior to the expiration of the six-year period of limitation, and its residence outside of the state since, makes it unnecessary to determine the issues of either implied or actual fraud.

The defendant was issued a broker's license under the Blue Sky Law of Minnesota in March, 1928, which was renewed annually thereafter until it was cancelled July 7, 1931. In connection with the issue of the broker's license defendant filed a power of attorney irrevocably appointing the Commissioner of Securities of the state its attorney to accept service of process on its behalf in any action against it involving a transaction covered by the Securities Act or Blue Sky Law. Service in this case was made upon the Securities Commissioner.

The sale of the shares of stock by the defendant to the plaintiff on May 7, 1929, was admitted, and it was shown that the receipt representing the stock was not registered as required by the Blue Sky Law.

The defendant was licensed as a foreign corporation to do business in Minnesota in June, 1930. On June 30, 1931, it filed a resolution of withdrawal and removed from the state. In the resolution of withdrawal it appointed the Secretary of State its attorney to accept service of process in any action against it growing out of any business done by it during the period covered by its license to do business in the state.

In the Stern case, supra, this court held that under the Minnesota law the departure of the defendant from the state and its subsequent absence therefrom and residence elsewhere tolled the statute of limitations; and that the

purchaser of securities sold in violation of the Minnesota Blue Sky Law was entitled to recover the purchase price from the seller. That decision is controlling of the same issues in this case, and it compels an affirmance of the judgment appealed from.

Affirmed.

Woodrough, Circuit Judge, dissents as indicated in City Company of New York v. Jay S. Stern, 8 Cir., 110 F. 2d 601.

APPENDIX "B".

DISTRICT COURT, FOURTH JUDICIAL DISTRICT, STATE OF MINNESOTA, COUNTY OF HENNEPIN

RUTH CHASE DONALDSON, *Plaintiff*,

vs.

CHASE SECURITIES CORPORATION, a Corporation, Now Known as Amerex Holding Corporation, *Defendant*.

Findings of Fact, Conclusions of Law and Order for Judgment.

The above entitled case being regularly on the General Term Calendar of the above Court came on for trial on May 9, 1939, before the undersigned, one of the judges of the above Court, and was tried without a jury on said day, and on May 10, 11, 12, and June 1, 2, and 10, 1939. T. O. Streissguth, and Messrs. Leonard, Street, and Deinard by Hyman Edelman, appeared on behalf of plaintiff, and Messrs. Stinchfield, Mackall, Crounse, McNally and Moore by Fred H. Stinchfield and John M. Palmer, appeared on behalf of defendant. On April 18, 1940, this court made and filed Findings of Fact, Conclusions of Law, and Order for Judgment herein, directing entry of judgment in favor of plaintiff and against defendant. On May 4, 1940, defendant interposed its motion to amend said Findings of Fact, Conclusions of Law, and Order for Judgment, or, in the alternative, for a new trial. On May 6, 1940, this court

made and filed its order, denying said motion, except for a minor correction. Said Findings of Fact, Conclusions of Law, and Order for Judgment sustained recovery by plaintiff on the ground of defendant's violation of the Blue Sky Law and the tolling of the Statute of Limitations. Therefore, the court found it unnecessary at that time to make Findings on plaintiff's claim of express fraud, fraud by implied representation, and fraud by suppression and concealment of material facts. Thereafter, defendant appealed to the Supreme Court of Minnesota from the order of this Court, dated May 6, 1940, denying its motion for amended Findings, or in the alternative for a new trial and from judgment entered in favor of plaintiff and against defendant, on June 18, 1940. The only issue involved in said appeal was the construction of the tolling statute, Mason's Minnesota Statutes, 1927, Section 9200. On January 10, 1941, the Supreme Court of Minnesota reversed said order and judgment "without prejudice", however, "to the issues other than that of the tolling of the Statute of Limitations." Thereafter, and on April 9, 1941, plaintiff moved this court for an order supplementing and correcting the Findings of Fact, Conclusions of Law, and Order for Judgment made and entered on April 18, 1940, so as to secure determination of the issues of express fraud, fraud by implied representations, and fraud by suppression and concealment of material facts. On May 16, 1941, plaintiff filed her Notice of Supplemental Motion for Additional Supplemental Findings of Fact and Conclusions of Law with respect to the applicability of Laws of Minnesota, 1941, Chapter 547. On May 14, 1941, defendant filed its motion to amend the Findings of Fact, Conclusions of Law, and Order for Judgment, dated April 18, 1940, in the particulars specified in said Notice of Motion, and for leave to argue the remaining issues of fraud and Statute of Limitations applicable thereto, and in connection with said motion defendant renewed its motions made at the conclusion of the trial, appearing in the typewritten transcript and settled case herein, at pages 466-475, to strike certain items of evidence referred to in said motions, upon the grounds therein enumerated. All of said motions were argued on

May 19, 1941, and thereafter written briefs were submitted by the parties. The Court having heard the testimony, arguments of counsel, and having examined the briefs filed herein, and being duly advised in the premises, hereby makes the following

Findings of Fact

I.

At all times herein mentioned plaintiff was, and now is, a resident of the City of Minneapolis, Hennepin County, State of Minnesota.

II.

The Chase National Bank of the City of New York (hereinafter called "the Bank") at all times herein mentioned was and now is a national banking association, organized under the provisions of the Act of Congress commonly known as the National Banking Act, and engaged in the banking business, with its banking houses and offices located and its general business conducted, in the City of New York, State of New York. On March 21, 1917, the Bank was capitalized at $10,000,000, consisting of 100,000 shares of stock of the par value of $100.00 each.

III.

Defendant (sometimes hereinafter called "the Corporation") was organized under the Business Corporation Law of New York on May 26, 1917, and ever since has been and now is a New York Corporation. The significant features of its charter will be summarized. The powers conferred on the corporation are comprehensive in scope, including authority to deal in securities. The amount of its capital was fixed at $2,500,000; no-par value shares to the number of 100,000 were to be issued; and the consideration for which it might issue and sell these shares was fixed at $25 a share. No share of its stock, issued to the Bank's stockholders, nor any interest therein, should "be sold, pledged, or otherwise disposed of or transferred, either voluntarily, by operation of law or otherwise, except

in each instance and from time to time together with a transfer to the same person or persons of a like interest in an equal number of shares of stock of said Bank. The sale, pledge or other disposition or transfer of any shares of stock of the Bank or any interest therein, either voluntarily, by operation of law or otherwise, by or in behalf of any such stockholder of the Bank or anyone claiming from or through such stockholder, either directly or by mesne transfers shall, if and to the extent that effect may then be given by law to this provision, operate ipso facto as a transfer to the same person or persons of a like interest in an equal number of shares of the stock of this corporation." All persons receiving shares of its stock as stockholders of the Bank, and those claiming under or through them, should and did irrevocably designate and appoint the "depositary with which shares of this corporation and of the Bank are deposited to insure their transfer together * * * their agent, in case of the sale, pledge, or other disposition or transfer of a share or shares of said stock of the Bank or of this corporation, or any interest therein, * * * to transfer to the same person or persons a like interest in an equal number of shares of this corporation or of the Bank, as the case may be, and to do and perform any and all acts to effectuate such transfer." The foregoing provisions might be modified or terminated by the affirmative action of the registered holders of at least seventy-five per cent (later reduced at 66⅔) of the shares of stock of the Bank and of the Corporation then outstanding and so deposited. The foregoing provisions should be stated in the certificates of stock of the Corporation.

IV.

The mechanics of arranging the affiliation between the Bank and the Corporation, contemplated by its charter, will be summarized.

Before organization of the Corporation, an agreement (herein called "the deposit agreement") dated March 21, 1917, had been entered into between all the Bank stockholders, a committee of such stockholders (herein called the "Committee") and Bankers Trust Company of New York.

Pursuant to the terms of the deposit agreement the Bank stockholders deposited all of their certificates with the Committee.

The Bank paid a special dividend of $25 a share, aggregating $2,500,000, which the Committee received. The Committee organized the Corporation, and used the fund of $2,500,000 to pay the Corporation for the 100,000 shares of its stock. Stock certificates of the Corporation were issued in the names of the depositing Bank stockholders for the same number of shares as their Bank stock. These certificates were deposited with Bankers Trust Company along with the shares of the Bank stock which the Committee had been holding; Bankers Trust Company took them as depositary for the Committee. As occasion called for the transfer of shares, new certificates would be issued, but these new certificates were printed on a single sheet, on one half a certificate for shares of the Bank stock, and on the other half a certificate for shares of the Corporation stock, and on the reverse side of the sheet were the usual printed forms for the transfer thereof. Bankers Trust Company issued to the depositing Bank stockholders receipts for their stock in the Bank and the Corporation, pursuant to the terms of the deposit agreement.

These receipts contained the following provision with reference to the deposited shares: "Neither said shares of the Bank nor said shares of the Securities Corporation are transferable separately, but this receipt and all rights and interests represented hereby are transferable by the registered holder, either in person or by attorney duly authorized on the books of the Depositary kept for that purpose, upon surrender of this receipt duly assigned, which assignment shall transfer all right, title and interest of the Depositor in the Deposited Shares. By delivering this receipt to the Depositary for transfer the holder thereof irrevocably constitutes and appoints the Depositary attorney to surrender the certificates for the Deposited shares and to receive from the Bank and from the Securities Corporation respectively in exchange therefor certificates of stock for the Deposited Shares registered in the name of the transferee hereof as entered upon the records of the Depositary, and hereby ir-

revocably authorizes the Depositary to hold the same subject to the provisions of the Deposit Agreement."

The receipts contained a printed form for the joint transfer of the deposited shares of stock of the Bank and of the Corporation represented by the receipts, and an irrevocable appointment of Bankers Trust Company as attorney for the person named in the receipt, to transfer the certificates for the deposited shares. The form included also a transfer of the receipt "and all rights and interests represented thereby."

By the provisions of defendant's charter and the deposit agreement, the shares represented by the receipts were linked together for sale and holding in such manner as to make the shares in one corporation non-transferable separately, and to make the ownership, sale, purchase, or transfer of shares in one corporation absolutely conditioned upon identical ownership, sale, purchase or transfer of shares of the other.

After the initial deposit, when the capital stock of the Bank was increased from time to time, an equal number of additional shares would be authorized and issued by the Corporation, and certificates for the new Bank shares and the new Corporation shares deposited with Bankers Trust Company, and receipts therefor issued to the persons entitled thereto.

V.

The mechanics of issuance and transfer of Bankers Trust Company receipts will be summarized.

Between 1917 and January, 1930, certificates of shares of the Bank and of the Corporation issued in the names of the persons designated in the outstanding Bankers Trust Company receipts were at all times in the custody of Bankers Trust Company in New York City. When an outstanding receipt was transferred, and surrendered by the transferee to Bankers Trust Company, the certificate for the shares of the Bank and of the Corporation represented by the surrendered receipt would be transferred by Bankers Trust Company under the power contained in the deposit agreement, to the transferee of the receipt, and a certificate for the shares of the Bank and of the Corporation would be

issued in the name of the transferee and deposited with Bankers Trust Company, which would in turn issue to the transferee a new receipt therefor in the form already described. The receipt-holders, in whose names the deposited shares stood were at all times recognized by the Bank and by the Corporation as their respective stockholders of record, entitled to vote the same, and to receive all dividends declared thereon.

VI.

By an agreement dated January 15, 1930, between Bankers Trust Company and the receipt-holders, designed to eliminate the expense incident to the use of such receipts, provision was made for the withdrawal of the receipts and the substitution of new "duplex" certificates to be issued by the Bank and by the Corporation to their stockholders. These duplex certificates were likewise printed on a single sheet, on one side a certificate for shares of the Bank stock, on the other side a certificate for an equal number of shares of the Corporation stock, each certificate bearing a legend restricting the holder from selling, pledging or otherwise disposing or transferring, "any share or interest therein in either corporation without at the same time transferring to or vesting in the same party an equal number of shares, or the same interest therein, in the other," and with one printed form for joint transfer. Thereafter the Bankers Trust Company receipts were retired, and in place thereof each stockholders received a new "duplex" certificate for the shares of the Bank and of the corporation represented by the receipt.

Hereinafter for brevity, both the Bankers Trust Company receipts and the "duplex" certificates, will be called "Chase units."

VII.

Defendant was organized and its stock inextricably bound up with the stock of the Bank, as has been described, at the instance of the Bank, its officers and shareholders acting as such, for the purpose of enabling the Bank and its stockholders to engage in business and stock operations, and to buy, hold, or sell its own capital stock.

VIII.

By amendment of its Articles of Incorporation, defendant's corporate name was changed from Chase Securities Corporation to "The Chase Corporation" in the year 1933. Thereafter, in the year 1934, its corporate name was again changed from the Chase Corporation to "Amerex Holding Corporation," which name ever since has been and still is its corporate name.

IX.

On March 22, 1928, pursuant to application made by it, defendant secured a broker's license issued to it by the Securities Division of the Department of Commerce of Minnesota, commonly known as the "Commission", under and in accordance with the provisions of Chapter 192, Session Laws of Minnesota for 1925, as amended, commonly known as the "Blue Sky Law." By successive annual applications defendant secured renewal broker's licenses for succeeding years. Said licenses authorized it to transact a lawful securities business as a broker within the State of Minnesota, subject to the provisions of said Law, for annual license periods ending March 21, 1929, 1930, 1931, and 1932.

Defendant, pursuant to the requirements of Section 3996-11, Mason's Minnesota Statutes, 1927, before being so licensed, and on March 17, 1928, appointed the Commissioner of Securities of Minnesota and his successor in office, its attorney for the service of process in any action or proceeding against it, in relation to or involving any transaction covered by said "Blue Sky Law."

X.

During the year 1928 defendant as such licensed broker appointed eight persons as its agents in Minnesota, and procured agent's licenses for them from the Commission.

During the year 1929, defendant procured the renewal of seven of said eight licenses and one additional agent's license, and thereafter by successive annual applications procured renewal agent's licenses for succeeding years. During 1928, 1929 and 1930, its licensed agents were authorized to sell, offer for sale and solicit the sale of lawful securities on its behalf within the State of Minnesota.

XI.

Defendant was also licensed as a foreign corporation on June 5, 1930, to do business in Minnesota, and continued so to be licensed until it filed a resolution of withdrawal on June 30, 1931, under and pursuant to Section 7494, Mason's Minnesota Statutes, 1927. Upon filing said resolution of withdrawal defendant appointed the Secretary of State its agent for service of process "in any action or proceeding of any nature or kind arising out of or involving anything done or omitted by said foreign corporation in this state while licensed to do business here."

XII.

From March, 1928, until July, 1931, defendant maintained offices within the State of Minnesota, fully staffed and equipped with furniture, supplies, and wire system, and was actually and continuously present and resident in the State of Minnesota, and doing business therein, and was engaged in the securities business therein, including the sale of stocks, shares, bonds, debentures and other securities directly and through its agents, in the course of continued and successive sales, and in the business of purchasing and acquiring directly and through its agents, securities for the purpose of reselling the same to others, and generally of buying, selling, otherwise dealing or trading in, promoting, negotiating, advertising and distributing such securities, under said broker's license, and defendant's agents were representing it in the State of Minnesota, and were engaged therein on its behalf in the selling, offering for sale and solicitation of the sale of securities.

As a part of its said business in the State of Minnesota, defendant was, during the entire year 1929, and for some time thereafter, engaged in the sale and disposition for value, offering for sale, and solicitation of the sale of Chase units, then in the form of Bankers Trust Company receipts.

XIII.

On or about August 8, 1929, at Minneapolis, Minnesota, defendant through one Weir Jepson, its agent duly author-

ized by it, solicited plaintiff to purchase and offered to and did sell to plaintiff eight Chase units, at a single indivisible purchase price of $1828.00, which plaintiff paid to defendant at Minneapolis on August 23, 1929. Bankers Trust Company's receipt, dated on or about September 9, 1929 (which was received in evidence as Plaintiff's Exhibit L) evidencing said eight Chase units was delivered to and received by plaintiff at Minneapolis, Minnesota, on or about September 10, 1929.

Following the delivery of said receipt, a similar receipt, dated February 3, 1930 (which was received in evidence as Plaintiff's Exhibit M) for one Chase unit, was delivered to and received by plaintiff at Minneapolis, Minnesota, on or about February 3, 1930. This receipt represented a stock dividend of 12½% declared by defendant and the Bank upon merger with National Park Bank, to all their stockholders of record as of August 23, 1929.

XIV.

On November 6, 1930, defendant issued to plaintiff, in exchange for her Bankers Trust Company receipt, a duplex certificate for nine units, No. F 52498, which was offered and received in evidence as Plaintiff's Exhibit N.

On August 12, 1936, defendant issued to plaintiff, in exchange for said duplex certificate, two certificates, one for nine shares of Bank stock, being Certificate No. 170,762, which was offered and received in evidence as Plaintiff's Exhibit P, the other a scrip certificate for 9/10ths of a share of Amerex Holding Corporation stock, which scrip certificate was, upon the payment by plaintiff to defendant of $2.45 for 1/10th of a share of said Amerex stock, converted into one full share of Amerex stock, evidenced by certificate No. 067,711, dated August 12, 1936, which was offered and received in evidence as Plaintiff's Exhibit O.

XV.

In selling said Chase units to plaintiff, defendant impliedly represented to plaintiff: that said Chase units were duly registered pursuant to the requirements of Mason's Minnesota Statutes, 1927, Chapter 21-b; that the solicita-

tion, offer and sale of said Chase units by defendant to plaintiff were in all respects in compliance with the laws and statutes of the State of Minnesota and the United States of America, and constituted a legal and valid solicitation, offer and sale of said Chase units; that said Chase units were in all respects valid, legal and genuine; that it and its agents were duly licensed to solicit, offer for sale and sell said Chase units in the State of Minnesota.

XVI.

Plaintiff offered to buy and defendant offered to sell said Chase units at the market price and in selling said Chase units to plaintiff defendant represented to plaintiff: that there was a free, uncontrolled and unmanipulated market for said Chase units at the price at which defendant then and there offered them to plaintiff; that the purchase by plaintiff of said securities was made in a free, uncontrolled and unmanipulated market and that the price at which plaintiff purchased said units from defendant was determined by lawful and legitimate factors of supply and demand and was free from any manipulation or control by defendant.

XVII.

In selling said Chase units to plaintiff, defendant fraudulently and wilfully suppressed the facts concerning the nature and formation of said Bank and its affiliate, Chase Securities Corporation, and fraudulently and wilfully concealed and suppressed the fact that said Chase units were not registered for sale within the State of Minnesota, and were illegally sold therein and that its agent Weir Jepson was not licensed to offer for sale or to sell said Chase units within the State of Minnesota, and fraudulently and wilfully concealed and suppressed the fact that defendant at the time of said sale to plaintiff was engaged in illegal pool activities by means of which defendant controlled and manipulated the market price of said Chase units and fraudulently and wilfully concealed and suppressed the fact that the market for said Chase units at the time of the sale to plaintiff was not a free, uncontrolled and unmanipulated market.

XVIII.

Plaintiff, in purchasing said Chase units had no notice or knowledge of the facts concealed from her as aforesaid, and believed the statements and representations, and each of them, so made to her, and believed and understood that no Chase units would be sold and delivered to her in violation of the laws of the State of Minnesota, and believing and relying upon the implied representations made to her as aforesaid and not otherwise, plaintiff was induced to and did purchase from defendant Chase units as set forth in paragraph XIII; the implied representations so made by defendant to plaintiff were false and untrue as it and its agents then and there well knew.

XIX.

By the provisions of said Blue-Sky Law, Chase units were required to have been registered as therein provided, before being offered for sale or sold within the State of Minnesota. Defendant, in violation and contravention of said Law and the duties imposed upon it, wilfully and fraudulently failed to register the Chase units according to the requirements of said Law, and the Chase units were never registered or licensed to be sold in Minnesota, and the sale thereof was never authorized in Minnesota by registration under said Law. The Chase units never were within any of the classifications of securities exempted from registration under Section 3996-2 of Chapter 21-b, Mason's Minnesota Statutes, 1927, and were never exempted from the operation of the provisions of said Law, and the sale thereof was never authorized in Minnesota by exemption from said Law. The sale of Chase units to plaintiff was not within any of the classifications of exempted sales specified in Section 3996-3 of said Chapter, and was not in fact excepted from the operation of said law, nor authorized by any provision of law. Said sale to plaintiff was not an isolated sale, but was made in the course of repeated and successive sales of Chase units by defendant, which was, at the time of said sale, offering Chase units for sale, soliciting the sale thereof, and selling the same to the public generally. Defendant never applied to the

Commission for the registration of Chase units or of its own capital stock, nor did it ever notify said Commission of its intention to sell Chase units or its own capital stock, and it never in fact at any time secured the license or approval of said Commission to sell, offer to sell, solicit the sale of, or attempt to sell, or negotiate or dispose of Chase units or its own capital stock.

Defendant, at all times mentioned herein, knew and was familiar with the requirements of said Blue Sky Law and wilfully failed to register the Chase units or its own stock.

As hereinafter more specifically found, for a considerable time prior to August 8, 1929, and on said date, defendant was engaged in the manipulation of the market on Chase units through pool operations, which defendant concealed; defendant must have known that if it had attempted to register the Chase units in Minnesota it would have been compelled to reveal those facts which constituted information relative to the securities necessary for the Commission to enable it to determine whether said securities should be registered and to properly pass on an application for registration, and, with such knowledge, attempted to evade the law requiring Chase units to be registered and licensed.

XX.

By the provisions of said Blue Sky Law, defendant's agents were forbidden to sell or offer for sale any securities within the State of Minnesota unless and until such agents had received agent's licenses from the Commission in accordance with the provisions of said law. At the time of said transaction with plaintiff, defendant's agent, Weir Jepson, had not been licensed as an agent by the Commission. Defendant at no time filed with the Commission any appointment or designation of said Weir Jepson as its agent, and never obtained from the Commission any agent's license for him, but wilfully and knowingly authorized and permitted said Weir Jepson to act as its agent and illegally to offer for sale and sell Chase units to plaintiff and others in the State of Minnesota in the course of successive and repeated sales thereof within the State of Minnesota.

XXI.

The sale by defendant through its unlicensed agent to plaintiff of said unregistered Chase units was made in Minnesota, in violation of the provisions of said Blue Sky Law and was illegal, and void, and incapable of ratification or confirmation as between the original parties to the sale. Because of the linking together of shares of Bank stock and shares of the Corporation's stock, and because an entire indivisible purchase price was required to be paid and was paid by plaintiff to defendant for said Chase units, the sale to plaintiff constituted a single, entire, indivisible and non-severable purchase and sale and was wholly illegal and wholly void.

XXII.

At the time of the sale of said units by defendant to plaintiff, defendant maintained and controlled an over-the-counter market for the purchase and sale of said Chase units; said market was not free and open; the price of said Chase units was not fixed according to lawful and legitimate factors of supply and demand, nor according to bona fide bid and ask prices, but the prices at which said Chase units were sold in said market were manipulated and controlled by defendant, as hereinafter more particularly set forth.

XXIII.

Prior to January 12, 1928, the stock of the Chase National Bank was listed on the New York Stock Exchange, and on said date was delisted at the request of said Bank. The stock of the Chase Securities Corporation was never listed on said New York Stock Exchange. After January 12, 1928, said units were traded in exclusively on the over-the-counter market maintained by defendant.

XXIV.

At the time of the sale of said units by defendant to plaintiff, and for a considerable time prior and subsequent thereto defendant was engaged in a vigorous and extensive campaign for the retail sale of said units to the public, for

the purpose of creating a larger clientele to whom defendant could sell and distribute stocks, bonds, and other securities from time to time at a profit.

XXV.

At all times herein mentioned, Metpotan Securities Corporation was a corporation organized and existing under the laws of the State of New York, and all of its capital stock was owned by defendant. All of the officers of said Metpotan Securities Corporation were likewise officers of defendant.

XXVI.

On September 21, 1927, defendant, through its wholly owned subsidiary Metpotan Securities Corporation, entered into a joint account or pool with McClure, Jones & Co., Potter & Co., and Blair & Co., to buy and sell Chase units. The letter and agreement confirming the organization of said pool was offered and received in evidence as plaintiff's Exhibit A-25, and is hereby expressly made a part of these Findings with like effect as though fully set out herein. The pool originally was to run for a period of sixty (60) days, commencing September 21, 1927, but was subsequently continued until March 20, 1928, and again extended until April 18, 1928. During all of said period said Metpotan Securities Corporation was the pool manager and in direct charge and control of the operations of said pool. Said Metpotan Securities Corporation was financed by defendant, and defendant furnished to it credit necessary for the carrying on of said pool activities. On December 31, 1927, said Metpotan Securities Corporation was indebted to defendant on account of advances to it in connection with said pool activities in the sum of $3,235,000. During all of said period defendant, through Metpotan Securities Corporation, daily bought and sold large blocks of said units. During the period commencing with September 21, 1927, and up to April 18, 1928, said pool purchased 22,217 units ($100 par) for $13,240,356.32, which units were sold at a profit to the pool of $50,620.73. At the time the account was opened, the quotation for Chase Securities units ($100 par) was 575 bid, 580 asked; and on April 18,

1928, the date the account was closed, the quotation was 684 bid, and 690 asked.

XXVII.

Immediately upon the close of this trading account, on April 18, 1928, another pool or trading account was formed with Metpotan Securities Corporation, Blair & Co., McClure, Jones & Co., and Potter & Co., as participants, and with Metpotan Securities Corporation and Blair & Co. carrying stock for this account. A letter from Metpotan Securities Corporation to Potter & Co., dated April 18, 1928, constituting the agreement defining the terms by which this pool was organized, was offered and received in evidence, marked Exhibit A-26, and is hereby made a part of these Findings with like effect as though fully set out herein. As in the earlier pool, the Chase Securities Corporation financed the activities of the pool by advancing and loaning to Metpotan Securities Corporation such moneys as were required from time to time for that purpose. On December 3, 1928, Metpotan Securities Corporation was indebted to defendant on account of such advances in the amount of $3,461,000. 59,552 shares were purchased by this syndicate or pool at a total cost of $50,180,175.30, and the pool continued its operations until April 9, 1929, and during its existence all of said shares were resold by the pool, with a profit of $554,760.42. The average price to the pool and its members was about $800 per unit, the price of the stock having risen during the life of the pool from an interim low of $435 per unit.

XXVIII.

On April 10, 1929, another pool in the stock of the Chase National Bank and Chase Securities Corporation was formed, with Metpotan Securities Corporation, McClure, Jones & Co., Broomhall, Killough & Co., Inc., and Potter & Co. as participants. A letter dated April 10, 1929, from Metpotan Securities Corporation to Broomhall, Killough & Co., Inc., constituting the agreement defining the terms by which said pool was organized, was offered and received in evidence, marked Exhibit A-27, and is hereby expressly made a part of these Findings with like effect as

though fully set out herein. Said pool was managed and controlled by Metpotan Securities Corporation. 12,630 units of $100 par value stock, and 442,934 units of $20 par value stock were bought for $103,216,184.84, the money to effect these purchases being advanced by the Metpotan Securities Corporation and the defendant Chase Securities Corporation. The account was terminated on July 3, 1930, with 38,440 units remaining in the account at an average cost to the participants of $167.85, the market price at that time being $140 per unit. The profit to the pool was $321,250.14.

XXIX.

On July 19, 1929, defendant caused to be formed another pool in Chase units with Dominick & Dominick, as pool managers (Exhibits A-28, A-33, A-34). Dominick & Dominick was a banking house which in 1929 had a stock commission business in the City of New York and held a membership on the New York Stock Exchange. This pool was formed on July 19, 1929, on the basis of an original allotment of 25,000 shares, with full discretionary powers granted to Dominick & Dominick to operate and manage the pool. An option was given by defendant to said pool managers to purchase from it 80,000 shares for the operations of the pool on the following scale of ascending prices:

20,000 shares at $210 per share
10,000 shares at $220 per share
10,000 shares at $225 per share
10,000 shares at $230 per share
10,000 shares at $235 per share
10,000 shares at $240 per share

(Exhibits A-28, A-33).

At the time of the giving of said options, the price of said Chase units was at or below the lowest price specified in said option.

As pool managers, pursuant to agreement with defendant, Dominick & Dominick had the sole management and charge of the entire conduct of the business and affairs of

the pool, with all the usual powers granted to a pool manager, including the right on behalf of the pool to make or procure loans and to pledge the obligations of the pool participants therefor to pay all commissions and expenses of every nature, and on behalf of the pool, to purchase, sell, sell short, repurchase, resell or hold Chase units, in such amounts and at such prices, and in such manner as they might deem advisable, and generally to act in all respects as in their opinion might be to the best interests of the pool; provided, only that the pool at no time was to be short or long, or to be committed for an amount in excess of 25,000 units. In addition to being the managers of the pool, Dominick & Dominick were participants in the profits, along with the other participants in the pool, including defendant. In order to prevent stock which was distributed by the the pool managers to the participants for retail distribution from coming back onto the market so as to interfere with pool sales operations, a penalty of $2 per unit was assessed against any participants for each unit of stock which was repurchased in the market by the pool during the period of the pool at or below the price at which it was originally taken down from the pool by the participants. Dominick & Dominick exercised the option to purchase and purchased from defendant and its affiliate corporations, Chase units in the quantities and at prices specified in the option letters (Exhibits A-28 and A-33) at a profit to the sellers of said Chase units of an amount in excess of one million dollars. The pool ran from July 19, 1929, to November 11, 1929. During that time 172,806 units were bought and 115,483 units were sold. 55,227 units were distributed to the participants. The profits accruing to the pool amounted to $1,452,314.68, and defendant received $261,416.64 as its share of said pool profits.

XXX.

During the year 1928, defendant and its wholly owned subsidiary Metpotan received profits from pool activities in Chase units in the amount of $726,846.01, and received profits from said pool activities in Chase units during the

year 1929 in the amount of $1,801,769.99. The following is a schedule showing purchases and sales by defendant and Metpotan of Chase units in 1928 and 1929:

Chase units (old)	Purchases		Sales	
	Shares	Money	Shares	Money
1928	71,869	$45,973,648.08	70,758	$45,753,743.55
1929	61,106	66,044,849.87	61,623	65,804,381.48
Chase Units (New)				
1929	716,000.6	150,692,148.92	684,709	145,815,916.83
Chase National Bank and Chase Securities Corporation Rights				
1928	74,272	3,942,521.46	74,275	3,942,651.92
1929	67,230.2	9,364,195.29	67,229.2	9,364,125.88

In 1928 and 1929 Chase, through its pools, bought and sold shares and rights involving a total volume of over a half billion dollars.

XXXI.

During the years 1928 and 1929, the defendant itself and through its wholly owned subsidiary and adjunct, the Metpotan Securities Corporation, engaged in pools and trading accounts for the purchase and sale of Chase units on a tremendous scale; that defendant did not disclose to the public, nor to the plaintiff, the existence of any pools and trading accounts in which it was interested nor its participation therein. Neither the plaintiff nor the public generally knew the defendant was using its own resources to finance pools and trading accounts, for the purpose of dealing in its own capital stock. Defendant participated in said pools and the trading accounts through its wholly owned subsidiary, Metpotan Securities Corporation, which was defendant's mere instrumentality and adjunct as a convenience to itself so as to avoid frequent reference to the state of its own surplus account in connection with its participation in said pools and trading accounts. In addition to its participation in said pools, defendant during the years 1928 and 1929, conducted a nation-wide campaign to sell Chase units at retail through its many branch offices located in various cities in the United States. Defendant's sale to plaintiff of said units was made in the course of said

campaign and plaintiff had no knowledge whatever of the existence of said pools, the profits which were being made by defendant, and its wholly owned subsidiary, and the influence which defendant was thereby able to exert on the over-the-counter market for said units, and the price at which said units were sold to the public.

By reason of said pools and defendant's participation therein, an appearance of great interest and activity in the market for said units was created for the purpose of attracting prospective purchasers, and for the purpose of raising the price of said units by concerted activities on its part and that of its associates in the pools.

Defendant and its associates were thereby enabled to unload their holdings of Chase units at a profit, upon the public, which was attracted by the activity of the defendant and its associates, and by information disseminated by them about said units. By the activities of the defendant and its associates, a false and deceptive appearance of genuine demand for the scurities on the part of the purchasing public was created, and plaintiff was induced to purchase said units upon such misleading appearance so fraudulently created. The quoted price of said units at the time of plaintiff's purchase of the same was not a true and genuine price arrived at by lawful and legitimate factors of supply and demand in a free market, but, on the contrary, the market appraisal of said units was wrongfully manipulated and controlled by defendant through the medium of said pools and trading accounts.

XXXII.

Plaintiff did not discover the falsity of defendant's statements and representations or any of them nor did she discover the facts concerning the illegal pool activities of defendant and its associates, nor did she discover the facts concerning the fraudulent and illegal acts of defendant aforesaid, nor any of the facts concealed, withheld and suppressed by defendant as aforesaid, until on or about October 1, 1937, and within six years prior to the commencement of this action, notwithstanding due diligence on her part.

In so far as plaintiff's cause of action is founded on representations knowingly made by defendant, and upon defendant's fraudulent and wilful concealment or suppression of material facts, it is an action for "relief on the ground of fraud" in which case, as provided in Mason's Minnesota Statutes, 1927, Section 9191, the cause of action is not "deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Plaintiff not having discovered the facts constituting defendant's fraud until October 1, 1937, seasonably commenced her action within the time limited by the statutes of the State of Minnesota.

In so far as the provisions of Laws of Minnesota 1941, Chapter 547, Sec. 18 (Mason's Stat. 1927, secs. 3996-24, as amended) are applicable to plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff, the time for assertion thereof or commencement of an action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of the State of Minnesota.

XXXIII.

Promptly upon discovery of the illegality of said sale, and on or about October 11, 1937, plaintiff formally repudiated said transaction and demanded a refund and return to her of the purchase price thereof, with interest, and tendered to defendant her certificates of stock, together with dividends and other income received by plaintiff therefrom, with interest. Defendant rejected said tender and refused to recognize plaintiff's repudiation of said transaction. In her complaint in this action and upon the trial, plaintiff renewed her tender and it was again refused by defendant. Each and all of the tenders so made by plaintiff to defendant were sufficient as a matter of law, but were refused by defendant. It would have been a vain and useless act for plaintiff to make any other or further tenders to defendant, it having clearly indicated to plaintiff that it would refuse any and all such tenders, and plaintiff was under no duty to keep her original tender open, or to

return any dividend checks subsequently received by her. A tender in money of the return of dividends was unnecessary because plaintiff was demanding the return of her purchase money, a much larger sum, and offered to permit defendant to deduct from the amount due plaintiff the amount of any dividends which she had received, with interest.

XXXIV.

Plaintiff from time to time before said discovery, as well as after said tenders and refusals thereof, received and accepted dividends upon said stock as follows:

Dividends on Chase Units:

October 1, 1929	$8.00	
January 1, 1930	8.00	
April 1, 1930	9.00	
July 1, 1930	9.00	
October 1, 1930	9.00	
January 2, 1931	9.00	
April 1, 1931	9.00	
July 1, 1931	9.00	
October 1, 1931	9.00	
January 2, 1932	9.00	
April 1, 1932	6.75	
July 1, 1932	4.50	
October 1, 1932	4.50	
January 2, 1933	4.50	
April 1, 1933	4.50	
July 1, 1933	3.15	
October 1, 1933	2.99	
January 2, 1934	2.99	
April 1, 1934	3.15	
August 1, 1934	4.23	
February 2, 1935	6.30	
August 1, 1935	6.30	
February 1, 1936	6.30	
		$148.16

Dividends on Chase National Bank Stock:

August 1, 1936	$6.30
February 1, 1937	6.30
August 1, 1937	6.30
February 1, 1938	6.30
August 1, 1938	6.30
February 1, 1939	6.30
	$37.80

Dividends on Amerex Holding Corporation Stock:

July 15, 1936	$ .50
February 1, 1937	.50
August 1, 1937	.50
February 1, 1938	.70
August 1, 1938	.70
February 1, 1939	.70
	$3.60

The total of the dividends so received up to and including June 10, 1939, was $189.56.

XXXV.

By reason of the premises, plaintiff has been damaged and defendant is indebted to plaintiff in the amount of $1,828.00, together with interest thereon at the rate of six per cent (6%) per annum from and after August 23, 1939, less credit for said dividends of $189.56, together with interest accrued from the dates of payment thereof.

XXXVI.

Subsequent to the time plaintiff purchased the said Chase units, there were numerous changes in the capitalization of the Bank and of defendant, as set forth in Paragraph XI, sub-division 8 of defendant's answer. Such changes were not confined to the individual shares sold to plaintiff, but affected all of the capital stock of both corporations. The changes resulted from action of the Bank and/or defendant or their respective stockholders in the course of the operation of the Bank or defendant. They could be made without the consent of the owners of any particular shares. Plain-

tiff from time to time was advised of such changes, but she did not actively participate therein, except as she acted as a stockholder before knowledge of defendant's wrongdoing and fraud. The possibility of such change was inherent in the shares at the time of the sale thereof to plaintiff and must be regarded as within the contemplation of the parties at the time.

Such changes in corporate structure in no way estop plaintiff from asserting defendant's wrongdoing; neither plaintiff's incidental and indirect participation in said corporate affairs, nor plaintiff's receipt and acceptance of dividends, constitutes a waiver of such wrongdoing.

XXXVII

Except as hereinbefore specifically found, the Court finds the allegations of defendants Answer not true and not sustained by the evidence, and defendant's motion for amended findings and conclusions of law, and defendant's motion to strike certain items of evidence (as appears from defendant's notice of motion dated May 14, 1941, on file herein) are in all things denied.

As

Conclusions of Law,

the court finds that:

1. Plaintiff is entitled to judgment against defendant in the sum of $1,828.00, plus interest thereon, at the rate of six per cent per annum from August 23, 1929, less the sum of $189.56 (the total of dividends received by plaintiff from defendant), together with interest on each dividend item at the rate of six per cent per annum from the date of receipt thereof by plaintiff (said dividends and dates of receipt thereof by plaintiff are set forth in paragraph XXXIV of the foregoing findings of fact), together with her costs and disbursements herein.

2. Upon satisfaction by defendant of said judgment, plaintiff shall deliver to the clerk of the District Court of Hennepin County, Minnesota, certificate No. 170,762 for 9 shares of common stock in Chase National Bank of the City

of New York, and certificate No. 067,711 for 1 share of common stock in defendant Amerex Holding Corporation, properly endorsed for transfer to defendant, which certificates shall, upon execution of proper receipt therefor, be delivered to defendant; and plaintiff shall, in addition, deliver or pay to said Clerk for delivery and payment to defendant, all dividends received by her on said stock since June 10, 1939, with interest at the rate of six per cent per annum from the date of the receipt thereof by plaintiff.

Let judgment be entered accordingly by the Court.

W. W. BARDWELL, *Judge.*

Dated: June 27, 1942.
Stay of 40 days B.

STATE OF MINNESOTA,
Supreme Court, ss.

I, Grace Kaercher Davis, Clerk of the above named Court and Custodian of the records thereof, do hereby certify that I have compared the within paper — writing to which this certificate is attached, with the Findings of Fact, Conclusions of Law and Order for Judgment contained in the original printed record in re *Ruth Chase Donaldson v. Chase Securities Corporation*, a corporation, now known as Amerex Holding Corporation, being #33458 now remaining on file in said action, and that the same is a true and correct copy of said original and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the Capitol in the City of Saint Paul, Minnesota, May 10, 1944.

GRACE KAERCHER DAVIS,
Clerk of Supreme Court.

[SEAL.]

By ——— ———,
Deputy Clerk.